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No. 977

IN THE
Supreme Court of the United States

No. October Term, 1963

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant

vs.

JONES MOTOR CO., INC.,
Appellee

JURISDICTIONAL STATEMENT

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 32629.

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INDEX

	Page
JURISDICTIONAL STATEMENT:	
I. Opinions Below	1
II. The Parties	3
III. Jurisdiction	4
IV. Statutes Involved	5
V. Questions Presented	13
VI. Statement of the Case	14
VII. The Questions Are Substantial:	
(a) The decision of the District Court in this case is directly in conflict with the decision of your Honorable Court in Arrow Carrier Corp. v. U. S., 375 U.S. 452	24
(b) The District Court has improperly made findings of fact at odds with those made by the Interstate Commerce Commission and unsupported by the record	31
(c) The District Court was also in error in not remanding the case to the Interstate Commerce Commission for action upon P.U.C.'s request for reopening of the record	43
Conclusion	45
Appendix "A"—Opinion and Order of U. S. District Court, Eastern District of Pa., Filed June 4, 1963 and Dissenting Opinion	47
Appendix "B"—Opinion and Order of U. S. District Court, Eastern District of Pa. on Rehearing and Dissenting Opinion	61

Appendix "C"—Order of I.C.C., Division 1, Dated Dec. 4, 1962 66

Appendix "D"—Report of Commission and Order of Division 1, Dated June 5, 1962 68

Appendix "E"—Corrected Report and Recommended Order of Examiner 88

TABLE OF CITATIONS

CASES:

Arrow Carrier Corp. vs. I.C.C., 375 U.S. 452 ..... 23, 24, 25, 28, 30, 45

American Trucking Association v. Frisco Transportation Co., 358 U.S. 133 (1958) 4

American Trucking Association, Inc. et al. v. United States et al., 364 U.S. 1 (1960) 4

Florida v. U. S., 282 U.S. 194, 215 32

Florida Lime and Avocado Growers v. Jacobson, 362 U.S. 73 (1960) 4

Frozen Food Express v. United States, 351 U.S. 40 (1956) 4

Herrin Transportation Co. v. U. S., 366 U.S. 419, aff'd 186 F. Supp. 777 42

Interstate Busses v. Holyoke Ry., 273 U.S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 520 (1927) 28, 40

Jones Motor Co. v. Pa. P.U.C., 188 Pa. Superior Ct. 261, 149 A. 2d 491, Allocatur Den., 188 Pa. Superior Ct. xxviii 15

Jones Motor Co. v. Pa. P.U.C., 361 U.S. 11 15

Labor Board v. Link-Belt Co., 311 U.S. 584, 597 34

Minneapolis and St. L. R. Co. v. United States, 361 U.S. 173 (1959) 4

Northwest Bar Corporation v. Board of Governors, etc., 303 F. 2d 832, 841 35

Pa. P.U.C. vs. Hudson Transportation Co., 83 M.C.C. 729 19

Pa. P.U.C. vs. Hudson Transportation Co., 88 M.C.C. 745 ..... 20, 30, 45

Pa. P.U.C. vs. Jones Motor Co., 36 Pa. P.U.C. 261 .. 15

Radio Corporation vs. Nelson Brothers, 289 U.S. 266, 285 41

Radio Officers' Union v. Labor Board, 347 U.S. 17, 48-49 34

Securities & Exchange Commission v. Chenery, 332 U.S. 194, 209 43

Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 ..... 15, 26, 31, 33

United States et al. v. Henry E. Drum et al., 368 U. S. 370 (1962) 4

STATUTES:

Administrative Procedure Act, 5 U.S.C. §1007(a) .. 41

Interstate Commerce Act, Part II:

Section 201 (49 U.S.C. §301) 5

Section 202(b) (49 U.S.C. §302(b)) 6

Section 203(a)(10) (49 U.S.C. §303(a)(10)) ... 6

Section 203(c) (49 U.S.C. §303(c)) 7, 14

Section 204(a)(6) (49 U.S.C. §304(a)(6)) 7

Section 204(c) (49 U.S.C. §304(c)) 8, 25

Section 206(a)(1) (49 U.S.C. §306(a)(1)) 8, 14

Section 212(a) (49 U.S.C. §312(a)) 10

Public Utility Law of May 28, 1937, P. L. 1053; 66 Purdon's Statutes 1122:

Section 202(b) 11
Section 202(c) 11, 14
Title 28, United States Code:
Section 1253 4
Section 1336 4
Section 1398 4
Section 2101(b) 4
Section 2284 4
Section 2321 4
Section 2322 4
Section 2325 4

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Appellee

On Appeal From the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 32629

JURISDICTIONAL STATEMENT

I.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, filed on June 4, 1963 and the Dissenting Opinion of J. Cullen Ganey, C.J., filed the same day, are attached hereto as Appendix A. The decision is reported in 218 F. Supp.

Opinions Below

133. On July 23, 1963, the District Court granted defendants' petitions for rehearing and reconsideration. On November 21, 1963, the United States District Court for the Eastern District of Pennsylvania filed its Opinion and Order on rehearing and that Opinion as well as the Dissenting Opinion of J. Cullen Ganey, C.J., are attached hereto as Appendix B. This is reported in 223 F. Supp. 835. The Order of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, dated December 4, 1962, affirming decision of Division 1, is attached hereto as Appendix C. The "Report of the Commission" and Order of Division 1, dated June 5, 1962, printed at 89 M.C.C. 605, is attached hereto as Appendix D. The corrected Report and Recommended Order, under service date of September 28, 1961, of the Examiner, is attached hereto as Appendix E.

II.
THE PARTIES

The Pennsylvania Public Utility Commission is the appellant and takes this appeal against the Jones Motor Company, Inc. as the appellee. Originally the Pennsylvania Public Utility Commission had brought this action before the Interstate Commerce Commission (I.C.C.) aga nst the Jones Motor Company, Inc. Highway Express Lines, Inc., Modern Transfer Company, Inc. and Motor Freight Express intervened in support of our complaint. After the I.C.C. had sustained our complaint, the Jones Motor Company, Inc. appealed to the United States District Court for the Eastern District of Pennsylvania, naming the United States and the Interstate Commerce Commission as defendants. In that case the Pennsylvania Public Utility Commission intervened as a party defendant and Highway Express Lines, Inc. and Modern Transfer Company, Inc. also intervened as party defendants. After reversal of the I.C.C. order, Highway Express Lines, Inc. and Modern Transfer Company, Inc. prosecuted a joint appeal and the Pennsylvania Public Utility Commission has prosecuted its appeal to this Court.

III.
JURISDICTION

The action before the United States District Court was brought pursuant to Title 28, United States Code, Sections 1336, 1398, 2284, 2321, 2322, and 2325, to vacate, set aside and annul an Order of the Interstate Commerce Commission. The Opinion and Order of the three-judge District Court was entered on June 4, 1963. By order dated June 14, 1963, the time within which to file a petition for rehearing in the matter was extended to July 5, 1963. Timely petitions were filed by defendants and oral argument on rehearing was had on October 11, 1963. The Opinion and Order on Rehearing of the three-judge District Court was entered November 21, 1963, and Notice of Appeal was filed in that Court by the Pennsylvania Public Utility Commission, Appellant herein, on December 12, 1963.

The jurisdiction of the Supreme Court to review this Opinion and Order by direct Appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b), and is sustained by the following decisions: *United States et al. v. Henry E. Dyar et al.*, 368 U.S. 370 (1962); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *American Trucking Association v. Frisco Transportation Co.*, 358 U.S. 133 (1958); *Minneapolis and St. L. R. Co. v. United States*, 361 U.S. 173 (1959); *Florida Lime and Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); and *American Trucking Association, Inc. et al. v. United States et al.*, 364 U.S. 1 (1960).

IV.

STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertinent to this proceeding are as follows:

National Transportation Policy

The National Transportation Policy (49 U.S.C., note preceding Part II, §301):

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; *to cooperate with the several States and the duly authorized officials thereof*; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Serv-

ice, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Italics added.)

Reserved Powers to States

Part II—Interstate Commerce Act, Section 202-(b) (49 U.S.C. §302(b)):

"Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Definitions

Part II—Interstate Commerce Act, Section 203-(a) (10) (49 U.S.C. §303(a) (10)):

"The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water: *Provided*, That to the extent that such transportation in 'interstate commerce' between points in Alaska and points in other States is performed within a foreign country, the application of this chapter shall not include any requirement as to conduct in such foreign country which is in confliet with a requirement of such foreign country, but shall include as a condition in en-

gaging in such operations within the jurisdiction of the United States, the observance, as to the entire service, of the requirements of this chapter with respect to rates, fares, charges, and practices pertaining to such transportation."

Certificate of Public Convenience

Part II of the Interstate Commerce Act, Section 203(c) (49 U.S.C. §303(c)):

"Except as provided in section 302(c) of this title, subsection (b) of this section, in the exception in subsection (a) (14) of this section, and in the second proviso in section 306(a) (1) of this title, no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person. July 12, 1960, Pub. L. 86-615."

Rules and Regulations

Part II of the Interstate Commerce Act, Section 204(a) (6) (49 U.S.C. §304(a) (6)):

"To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in

connection therewith, and to prescribe rules, regulations, and procedure for such administration."

Complaint Proceedings

Part II of the Interstate Commerce Act, Section 204(c) (49 U.S.C. §304(c)):

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Certificate of Public Convenience and Necessity

Part II of the Interstate Commerce Act, Section 206(a) (1) (49 U.S.C. §306(a) (1)):

"Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such

carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instances as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operations to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful."

Statutes Involved

Revocation of Certificate

Part II of the Interstate Commerce Act, Section 212(a) (49 U.S.C. §312(a)):

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate permit, or license shall be revoked, (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sec-

tions 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

Pa. Public Utility Law

Pennsylvania Public Utility Law—Article II—Certificate of Public Convenience, Section 202(b) & (c), *Acts requiring certificates:*

"(b) For any public utility to renew its charter, or obtain any additional right, power, franchise, or privilege, by any amendment or supplement to its charter or otherwise.

(c) For any public utility to begin the exercise of any additional right, power, franchise, or privilege."

Public Utility Law of May 28, 1937, P. L. 1053, Section 202(b) and (c); 66 Purdon's Statutes 1122:

"Upon approval of the Commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(b) For any public utility to renew its charter, or obtain any additional right, power, franchise, or

privilege, by any amendment or supplement to its charter, or otherwise.

(c) For any public utility to begin the exercise of any additional right, power, franchise, or privilege."

V.

QUESTIONS PRESENTED

The following questions are presented for determination:

1. Did the District Court err in failing to apply the correct principles of law pertaining to the doctrine of subterfuge?

2. Did the District Court err in ruling that the Pennsylvania Public Utility Commission had not proceeded in the proper manner?

3. Did the District Court err in applying the legal principles pertaining to the scope of review in such cases?

4. Did the District Court err in substituting its judgment for that of the Interstate Commerce Commission?

5. Did the District Court err in making findings of fact not made by the Interstate Commerce Commission?

6. Did the District Court err in failing to remand the record for decision upon complainant's request to complete the record?

VI.

STATEMENT OF THE CASE

On November 20, 1959, the Pennsylvania Public Utility Commission ("P.U.C.") filed a complaint before the Interstate Commerce Commission ("I.C.C." or "Commission") against the Jones Motor Co., Inc. ("Jones"), alleging that in May and June of 1957 Jones transported property between certain points in Pennsylvania over routes and highways in Pennsylvania and New Jersey as a subterfuge to the jurisdiction of the P.U.C., and in violation of sections 203(c) and 206(a)(1) of the Interstate Commerce Act, as well as sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania, Act of May 28, 1937, P. L. 1053, as amended, 66 Purdon's Pennsylvania Statutes Annotated (P.S.) §1122.

The complaint specifically charged 22 violations which included: eleven shipments originating in Philadelphia for delivery in Allentown, Bethlehem, Easton and Catasauqua, Pennsylvania; four shipments originating in Easton destined for Philadelphia and Hatboro, Pennsylvania; three shipments originating in Bethlehem for Philadelphia; one shipment originating in Oaks for Bethlehem; one shipment originating in Emmaus for Philadelphia; one shipment in Catasauqua for Philadelphia; and one shipment originating in Chester for Bethlehem. The P.U.C. requested that the I.C.C. issue an order requiring defendant to cease and desist from performing such transportation between points in Pennsylvania.

The complaint arises out of a proceeding which was before your Honorable Court previously. On October 12, 1959, your Honorable Court in this same case on Petition for Writ of Certiorari to the Superior Court of Pennsylvania (facts and opinion in 188 Pa. Superior Ct. 449, 149 A. 2d 491) in a per curiam decision granted the petition and reversed the judgment, citing only *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171. *Jones Motor Co. v. Pa. P.U.C.*, 361 U.S. 11. A petition for clarification and reconsideration was denied, 361 U.S. 904.

This prior proceeding before your Honorable Court had its inception in a complaint proceeding filed by the P.U.C. before itself on August 5, 1957, charging Jones with subterfuge on the same 22 shipments mentioned above. The P.U.C., after hearing and briefs, sustained the complaint and found Jones guilty of a subterfuge: *Pa. P.U.C. vs. Jones Motor Co.*, 36 Pa. P.U.C. 261. On appeal to the Superior Court of Pennsylvania, that Court unanimously affirmed, 188 Pa. Superior Ct. 261, 149 A. 2d 491. The Supreme Court of Pennsylvania denied Allocatur on April 27, 1959, 188 Pa. Superior Ct. xxviii, and a petition for a writ of certiorari was then filed with your Honorable Court.

Since your Honorable Court in the *Service* case ruled that the proper forum was not the individual States but the I.C.C., your Honorable Court following that decision reversed the Superior Court of Pennsylvania. The P.U.C. in due course filed the same complaint with the I.C.C., which is now before your Honorable Court.

Jones filed an answer with the I.C.C., failing to deny the acts of transportation alleged, but claiming justifica-

tion in its certificates of public convenience and necessity issued by the I.C.C. It also moved to dismiss the complaint on the ground of *res judicata qua*, 361 U.S. 11. By order dated October 4, 1960, the I.C.C., acting through Commissioner Murphy, overruled Jones' motion to dismiss. On the same date the Commission also allowed Highway Express Lines, Inc. and Modern Transfer Company, Inc., P.U.C.-licensed motor carriers, to intervene on the side of the P.U.C.

Hearing was had in Philadelphia on February 8, 1961, after which briefs were filed by the parties.

The facts as presented at the hearing were in part as follows:

On May 1, 2 and 24, and June 28, 1957, Jones transported the 22 shipments alleged in the complaint between various points in Pennsylvania, generally comprising the Philadelphia area and the Allentown area. The trucks carrying these shipments did not go directly between these points over the customary routes in Pennsylvania, i.e., U. S. Highway Route 309 or the Pennsylvania Turnpike, but rather went into New Jersey from Philadelphia over U. S. Highway Route 1 to Trenton, N. J., thence over New Jersey Highway 69 to Clinton, N. J., and thence over U. S. Highway 22 to Allentown, Pennsylvania. The transportation from Philadelphia to Allentown (and vice versa) was non-stop, terminal to terminal. There were no goods picked up in New Jersey, no deliveries made in New Jersey, no stops made at any terminals in New Jersey. The truck started from Philadelphia with the sole objective of reaching Allentown, Pennsylvania, as soon as it could.

The parties stipulated that the distance between Philadelphia and Allentown using U. S. Highway 309 solely within Pennsylvania was 55 miles, requiring two hours and five minutes driving time, and that the distance between these points using the Pennsylvania Turnpike was 75 miles with a driving time of one hour and fifty minutes.

The parties also stipulated that the distance between Philadelphia and Allentown, Pennsylvania, going by way of Trenton and Clinton, New Jersey, was 96.2 miles, requiring three hours' driving time. Jones' I.C.C. certificates did not provide for transportation between Philadelphia and Allentown, Pennsylvania.

At MC 4963 Jones is authorized to perform the following transportation, inter alia:

> "It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:
>
> Regular Routes:
>
> * * * * * * * *
>
> "*General commodities*, except those of unusual value, and except dangerous explosives, livestock, films, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,
>
> * * * * * * * *
>
> "Between Philadelphia, Pa., and New York, N.Y.: From Philadelphia over U. S. Highway 1 to New York, and return over the same route.

Service is authorized to and from all intermediate points.

* * * * * * * *

"Service is authorized to and from off-route points in that part of Pennsylvania within 20 miles of Spring City, Pa., those in that part of New Jersey within 35 miles of Jersey City, N. J., those in that part of New Jersey within 35 miles of Princeton, N. J., and all other off-route points in the New York, N. Y., Commercial Zone, as defined by the Commission in 1 M.C.C. 665."

At MC 4963, Sub. No. 7 Jones is authorized to perform the following transportation:

"It Is Further Ordered, That the Transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Regular Routes:

"*General Commodities*, except those of unusual value, livestock, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

"Between Allentown, Pa., and Elizabeth, N. J.: From Allentown, over U. S. Highway 22 to junction New Jersey Highway 28 near Raritan, N. J., and thence over New Jersey Highway 28 to Elizabeth, and return over the same route.

"Service is authorized to and from all intermediate points and the off-route points of Lancaster, Pa.,

Dover, Newark, Hackettstown, Washington, Belvidere, and Newton, N. J. and points in Pennsylvania within 25 miles of Allentown."

Jones has attempted to justify its authorization on the basis of combining two separate I.C.C. certificates, one between Philadelphia and New York, and the other between Elizabeth, New Jersey and Allentown, Pennsylvania. Because the routes between these cities cross, Jones claims it can serve between Philadelphia and Allentown, Pennsylvania, in the manner it does. In the terminal to terminal operations between Philadelphia and Allentown, Jones also transports goods which have either their origin or destination outside of Pennsylvania. It further claims that because it is transporting items in interstate commerce it should also have the privilege of transporting items which are essentially intrastate in nature.

Two licensed intervening P.U.C. carriers appeared at the hearing and presented evidence that the usual shipping routes between Philadelphia and Allentown are routes which lie wholly in Pennsylvania, that is, either U. S. Highway 309 or the Pennsylvania Turnpike.

Under service date of September 25, 1961, the Examiner recommended that the complaint of the P.U.C. be dismissed, noting at that time that petitions for reconsideration in the related cases of *Pa. P.U.C. v. Hudson Transportation Co.*, 83 M.C.C. 729, were still pending (the I.C.C. had granted the petitions and the entire 11-member Commission was considering the order of Division 1).

Exceptions to the recommended Report and Order were filed by the P.U.C. and intervening carriers. In the

meantime the Commission in a 10-1 decision reaffirmed the order of Division 1, in *Pa. P.U.C. vs. Hudson Transportation Co.*, reported in 88 M.C.C. 745.

Division 1, on June 5, 1962, after consolidating with the Jones case another proceeding filed by the Pennsylvania P.U.C. against National Freight, Inc., and Victory Transportation Co., Inc., issued a Report and Order (reported in 89 M.C.C. 605) in which it found that Jones had been performing transportation between points in Pennsylvania through points in New Jersey as a subterfuge for the purpose of evading the laws of Pennsylvania, which subterfuge was not authorized in any certificate issued by the I.C.C.

Division 1 entered a cease and desist order in which it ordered Jones "to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character." The order was to become effective July 23, 1962.

Division 1 in a 19-page report held:

> "Upon consideration of all the facts of record, we are convinced that the challenged operations subject to regulations, although ostensibly authorized by their certificates, are, except for their routing, actually in intrastate commerce, and that they are conducted as a subterfuge to evade the laws of Pennsylvania."

Division 1 in addition to the stipulated facts previously adverted to, also described Jones' operations as follows:

"Jones operates terminals in Philadelphia and Allentown, and its main activity is the movement of less-than-truckload freight. In order to gather the shipments and, by combining them, make up a full truckload, it operates 'peddler runs' from its Philadelphia and Allentown terminals which serve as pick-ups and deliveries of freight in the Philadelphia and Allentown area. All of the freight is directed through the Allentown and Philadelphia terminals and is transported on a daily nightly schedule without stops to pick up and deliver freight between such terminals over the Clinton route which is **substantially circuitous** when compared with the direct intrastate routes between Philadelphia and Allentown. Jones' traffic officer admitted that the Clinton route is utilized because 'we know we are authorized.' He also stated that Jones advertised to shippers 'as to service we perform in our interstate authorities.' It also, admittedly, publishes the same rates as intrastate carriers and is competitive with such carriers operating between considered points." (Emphasis added.)

After comparing the facts in the Hudson case, which were found to be practically identical, Division 1 adopted, as to Jones, the statements made therein, that:

> **"No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it;** and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in the intrastate traffic purportedly under rights arising from certificates issued by this Commission."

Jones then filed a petition for reconsideration which was denied on December 4th, 1962.

Thereupon, Jones filed on January 6, 1963, a complaint with the District Court for the Eastern District of Pennsylvania. A temporary restraining order was issued by the Court under date of January 30, 1963. The motions of the P.U.C. and Highway Express Lines, Inc., and Modern Transfer Co., Inc., to intervene as party defendants were granted.

Argument before the Court was had on April 4, 1963, and on June 14, 1963, the District Court reversed the I.C.C. in a 2-1 decision, Circuit Judge Ganey dissenting. 218 F. Supp. 133.

The District Court, while recognizing that the basic facts presented to the Hearing Examiner were not in dispute, assumed that the I.C.C.'s adoption of the Examiner's facts, ipso facto, was an adoption by the I.C.C. of all the inferences and conclusions flowing therefrom, **in spite of explicit statements by the I.C.C. to the contrary in its report.** On this premise, the District Court in its opinion set forth at length the findings and conclusions of the Examiner which had been overruled by the I.C.C. **as if they were the actual findings and conclusions made by the I.C.C.** Without even quoting the findings made by the I.C.C. which were to be reviewed, the District Court held that the order of the I.C.C. was not supported by substantial evidence. The District Court also made its own findings on the record holding that "Jones also proved that it provided a complete and economical transportation service to its customers . . . ." The District Court rejected the I.C.C. finding of bad faith.

"We must reject this unwarranted conclusion and adopt the Examiner's 'Corrected Report and Recommended Order.'

The dissenting opinion of Circuit Judge Ganey held directly contrary to the majority opinion and in support of the I.C.C.

"The record discloses no logical reason or economic purpose for the carrying of the goods across the state line into New Jersey on a certificated route and, accordingly, the Commission reached the conclusion that the transportation was merely subterfuge to avoid compliance with the Pennsylvania Public Utilities (sic) Commission regulation which had denied to plaintiff a certificate. . . .

"While there can be no denial that the concept of interstate commerce embraces a movement between points in one state through another state, the transportation so performed must not be in bad faith to escape the proper jurisdiction of the terminal state. Eichholz v. Public Service Commission of Missouri, 306 U.S. 268, 274."

Petitions for reconsideration were filed and granted and reargument held on October 11, 1963. On November 21, 1963, the District Court reaffirmed its prior order in another 2-1 decision. See 223 F. Supp. 835. From this decision, the instant appeal was taken.

Pending this appeal, your Honorable in a similar case, *Arrow Carrier Corp. vs. I.C.C.*, 375 U.S. 452, affirmed per curiam on Jan. 20, 1964, the decision of the three-judge court in New Jersey (219 F. Supp. 43), ruling directly contrary to the majority decision in the instant case at bar.

VII.
THE QUESTIONS ARE SUBSTANTIAL

(a) The decision of the District Court in this case is directly in conflict with the decision of your Honorable Court in Arrow Carrier Corp. v. U.S., 375 U.S. 452.

The three-judge statutory court in this case on June 4, 1963, reversed the order of the Interstate Commerce Commission and reaffirmed its order after reargument on November 21, 1963. The decisions by the District Court in this case were issued prior to your Honorable Court's decision in *Arrow Carrier Corporation v. U.S.*, 375 U.S. 452, decided January 20, 1964. It is our contention that the instant case is ruled by the decision of your Honorable Court in the *Arrow* case and therefore the decision of the District Court in this case must be reversed.

In the *Arrow* case your Honorable Court found that Arrow Carrier Corporation and the Hudson Transportation Company were transporting property between Philadelphia and Allentown by way of routes and highways in New Jersey as a subterfuge to the jurisdiction of the Pennsylvania Public Utility Commission, notwithstanding the movements were carried out under the aegis of "tacking" Interstate Commerce Commission certificates.

Your Honorable Court found in the *Arrow* and *Hudson* cases that there was "overwhelming" proof of subterfuge. In the *Arrow* case, *Arrow* was picking up cargo in Philadelphia destined for Allentown. Arrow went into New Jersey either over U. S. Highway No. 1 or the Ta-

cony-Palmyra Bridge; thence to Trenton, New Jersey; thence to Clinton, New Jersey, and thence to Phillipsburg, New Jersey, where the Arrow truck stopped to load or unload freight. After making this stop the truck then continued on U. S. Highway 22 across the Delaware River into the State of Pennsylvania to Allentown. Hudson Transportation Company followed similar routes without a stop. The Interstate Commerce Commission in our complaints found such operations to be subterfuge, pure and simple. The District Court of New Jersey affirmed unanimously and your Honorable Court affirmed per curiam.

In the case at bar, Jones Motor Company transports goods from Philadelphia to Allentown by the same routes: from Philadelphia, it goes to Trenton over U. S. Highway No. 1, thence to Clinton, New Jersey and thence over U. S. Highway 22 to Allentown, Pennsylvania. **There is no difference whatsoever between Arrow's routes and Jones'.**

The decision of the District Court in this case in reversing the Interstate Commerce Commission is completely at variance with the decision in the *Arrow* case and the *Jones* case, therefore, if it were allowed to stand, would completely nullify the effect of the *Arrow* decision.

The reasons for the District Court decision in the *Jones* case may have been the Court's belief that certain principles set forth in the decision of the New Jersey District Court in the *Arrow* case would not be accepted by your Honorable Court as valid principles of law. For example, the New Jersey District Court gave clear and unequivocal approval to the procedure followed by the Public Utility Commission in bringing a complaint before the Interstate Commerce Commission under Section 204(c)

of the Interstate Commerce Act as per your decision in the *Service Storage and Transfer* case. The District Court of New Jersey said:

> "The procedure followed by the Pennsylvania Public Utility Commission in bringing the situations to the Interstate Commerce Commission is entirely proper."

On the other hand, the District Court for the Eastern District of Pennsylvania inferentially questioned the procedure followed. That Court said:

> "If the Commission [I.C.C.] feels that this unforeseen use violates the law of Pennsylvania, proper procedures are available to correct this situation. Congress has provided the remedy in 49 U.S.C.A. §312(a) . . ."

Apparently the District Court of Pennsylvania also had grave doubt as to whether subterfuge was even an issue. In its original opinion dated June 4, 1963, the District Court said:

> "While it is solely within the province of the Commission to determine that any carrier has *abused* its certificate, such *abuse* is *not* shown when a carrier makes an authorized use of his unrestricted certificates which the Commission admits are validly tacked."

On the other hand, the New Jersey District Court held unequivocally that subterfuge is such abuse and is *the issue*. That Court, in part, stated:

> "What the P.U.C. claimed to the Interstate Commerce Commission by its complaint was that in their

actions outlined heretofore, Hudson and Arrow had abused their interstate certificates . . . .

"From all of the evidence in these two suits the unavoidable conclusion is that the Hudson and Arrow routes involved are not logical and normal operations through their headquarters; that the use by Hudson and Arrow of their tacked on routes is a deliberate, calculated method employed by those carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth. Said evidence overwhelmingly points to those tacked on routes as artificial, contrived arrangements adopted by Hudson and Arrow in order to obtain desirable Pennsylvania intrastate business which would be otherwise unavailable to them. The record makes it very clear that we are here dealing not with bona fide transportation in interstate commerce but with a mystic maze route which is a more or less shrewd expedient designed solely to escape the control of the Pennsylvania Commission. In the full sense of the word, the operations are subterfuges."

The New Jersey District Court adopted as the test for determining subterfuge the test stated by your Honorable Court in footnote 4 of your *Service* decision; **whereas the Pennsylvania District Court did not state what the test was.** The District Court of Pennsylvania instead of analyzing whether Jones' operation was logical and normal for carrying intrastate commerce as such, applied a process of reasoning by which it first assumed that the routes in New Jersey were proper for interstate commerce and that by commingling intrastate goods with interstate

goods, the routes therefore became also proper for intrastate commerce. The District Court never recognized the doctrine repeatedly set forth by your Honorable Court in such cases as **Interstate Busses v. Holyoke Ry.**, 273 U.S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 520 (1927), wherein your Honorable Court said:

> **"Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary means of the same instrumentalities and employee."**

It may be seen that the District Court's reasoning in this case would nullify completely the doctrine of subterfuge established by your Honorable Court in the *Arrow* case. In that case the Arrow Carrier Corporation also had goods to points other than in Pennsylvania and in fact in that case Arrow Carrier was actually making a stop at a terminal in Phillipsburg, New Jersey, to load and unload goods in interstate commerce. There was, therefore, more reason to exonerate the Arrow Carrier Corporation on the charge of subterfuge then there is Jones in this case. How, then, can Jones be treated differently with any consistency?

Among other fallacies committed by the District Court is the assumption that Jones is committed to operating over the devious routes in the State of New Jersey to perform transportation of state-to-state cargo. By order dated July 15, 1957, the I.C.C. issued a series of Deviation Rules (reported in the Federal Register), which provide in part:

> "211.1
>
> (a) . . .

(b) . . .

(c) . . .

(8)

(i) *Superhighways as alternate routes.* Where a regular route motor carrier is authorized to operate over a regular service route and there is extending in the same general direction as such service route, and wholly within the United States, a so-called superhighway, turnpike, thruway, freeway, or expressway, which is substantially the same in purpose, design, and construction as such highways as the Pennsylvania Turnpike, the New Jersey Turnpike, the Turner (Oklahoma) Turnpike, the West Virginia Turnpike, and the New York Thruway, such superhighway, turnpike, thruway, freeway, or expressway and such additional highways as it may be necessary to use in traveling by the shortest practicable route between the carrier's authorized regular service route and the superhighway, turnpike, thruway, freeway, or expressway may be used as an alternate route between two points on the carrier's regular service route regardless of the ratio of the distance over such alternate route between the point of deviation and the point of return to the distance over the carrier's regular service route between the same points, and regardless of whether or not such alternate route crosses or intersects or passes over or under, any other specifically authorized service or alternate route of the carrier at any place intermediate to the points of deviation and return; *provided*, that the use of the alternate route will not materially change the competitive situation between such carrier and any other."

The Questions Are Substantial

Under the Commission's Deviation Rules Revised, 1957, Jones could use the Pennsylvania Turnpike for non-stop movement between Philadelphia and Allentown for its interstate freight. It is not bound to go into devious routes in New Jersey for its interstate operations. It does so only for the purpose of attempting to convert what is essentially intrastate commerce into interstate commerce. The District Court was, doubtlessly, unaware of the Commission's Deviation Rules. It is for this and similar reasons that your Honorable Court has continuously chided the lower federal courts against upsetting decisions by the I.C.C., a body qualified by knowledge and learned by experience, where substantial evidence exists.

The test laid down in the *Arrow* case was whether the carrier's "use of its authorized route is . . . other than a logical and normal operation through the carrier's headquarters. . . ." It is obvious from the abundant evidence in this case that there is no logical justification, economic or otherwise, for Jones to travel non-stop between Philadelphia and Allentown, Pa., by devious routes in New Jersey, running approximately twice as long as the normal and direct routes in Pennsylvania. This case has all the earmarks and characteristics that were found to constitute subterfuge in the *Hudson Transportation Co.* and *Arrow Carrier Corp.* cases.

It is respectfully submitted that the decision of the District Court of Pennsylvania in the *Jones* case is directly contrary to your decision in the *Arrow* case and should be overruled. The dissenting opinion of Circuit Judge Ganey correctly harmonized the *Jones* case with the *Arrow* decision when he said of *Jones*:

> "The record discloses no logical reason or economic purpose for the carrying of the goods across

the state line into N. J. on a certificated route and, accordingly, the Commission reached the conclusion that the transportation was merely subterfuge to avoid compliance with the Pennsylvania Public Utility Commission regulation which had denied to plaintiff a certificate."

Certainly if reasonable minds can differ as to the determination of such, the original decision of the Interstate Commerce Commission ought to be sustained.

(b) The District Court has improperly made findings of fact at odds with those made by the Interstate Commerce Commission and unsupported by the record.

In *Service Storage & Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, your Honorable Court held that the proper tribunal to construe I.C.C. certificates and to decide the question of whether an I.C.C. motor carrier is committing a subterfuge of a State's regulatory jurisdiction is the Interstate Commerce Commission.

In pursuance of this direction, the Pennsylvania Public Utility Commission applied to the I.C.C. for a cease-and-desist order against the Jones Motor Co., Inc. on the ground that it was transporting between points in Pennsylvania (mainly between the Philadelphia and Allentown areas) without a certificate from the P.U.C. by the use of routes and highways in the State of New Jersey as a subterfuge to our regulatory authority. The I.C.C. made its decision and construed Jones' two I.C.C. certificates,

holding that Jones was never authorized by the I.C.C. to serve between two points in Pennsylvania, but that Jones was performing this transportation under the asserted right or theory of "tacking" its two certificates together. The I.C.C. considered the facts, including the distances involved in the travel by way of New Jersey, the driving time, the reasonableness of using interstate highways for the transportation of what is essentially intrastate freight, and the reasons given by the company in support thereof, and concluded that such service as conducted by Jones was nothing but a subterfuge of the jurisdiction of the Pennsylvania Comission. The I.C.C. opinion, which devoted 19 pages to a thorough discussion of the facts and the law, is attached to this Jurisdictional Statement as Appendix A.

The District Court, in utter disregard of your Honorable Court's admonition in **Florida v. U.S.**, 282 U.S. 194, at p. 215, that "**The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported,**" proceeded in this case to make its own findings of fact completely at odds with those of the I.C.C. and, on this basis, to hold that the conclusion of the I.C.C. was in error and without substantial evidence. That the District Court did this is apparent from a comparison of the findings contained in the District Court opinion, with the facts found in the I.C.C. opinion.

For example,[1] the Court apparently gives weight to a finding that only 5% of Jones' business consists of state

[1] Since this is only the Jurisdictional Statement there is no reason to review all of the improper findings of fact relied upon by the District Court.

freight (freight that originates and is destined at and for points in Pennsylvania), for the purpose of giving the facts here the color of the *Service* case. The Court sets this forth in its Opinion of June 4, 1963, as follows:

> "Jones stated at the hearing on this matter that less than five per cent of its business concerns such challenged transportation (N.T. 13-14)."

What the Court cites for this statement is not any finding by the I.C.C., or even any page in the record, but a remark that Christian Graf, Esq. made at the Bar of the Court on oral argument. For the Court to show that it has been influenced by this completely unsupported statement outside of the record in itself must vitiate the entire opinion of the Court in this case, apart from anything else.

The irony of this finding by the District Court is that during the hearings before the I.C.C. when the Vice-President of Jones (its only witness) was questioned as to what percentage of business its state freight formed of its overall business, the witness after some colloquy stated: "I haven't checked it" (N.T. 177), and when pressed, "I don't know that" (N.T. 178). Jones' counsel even objected to this inquiry and said:

> "If, as we contend these routes are lawfully operated and if, as we contend, this traffic is in fact interstate commerce within the definition contained in 203(a)(10) of the Act, then whether the volume be great or small has no bearing, and if in fact we do not have the right to use these routes and if in fact this transportation is not interstate commerce, then the volume again is not relevant."

The Questions Are Substantial

The District Court made findings of fact that Jones provides a complete and an economical transportation service. The I.C.C. made no such findings. The District Court states:

> "Jones also *proved* that it provided a complete and economical transportation service to its customers by Exhibits 7, 8, 9 and 10, which show that the same consignors are served at the same time on traffic going to other points and that all of this traffic can be picked up at one time."

Beside the fact that Exhibits 7, 8, 9 and 10 **do not** contain the names and addresses **of any** consignors or consignees, the I.C.C. made a finding entirely opposite when it said: "'No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it. . . .'" The District Court therefore made its own finding in direct contrast to what the I.C.C. made. By making its own findings, the District Court could not perform its function as a reviewing court in the proper manner. Its function was merely to determine whether the *findings made by the I.C.C.* were supported by substantial evidence. It does not perform this function by competing with the I.C.C. in fact-finding.

> "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts (cases cited)." *Labor Board v. Link-Belt Co.*, 311 U.S. 584, 597.

See also, *Radio Officers' Union v. Labor Board*, 347 U.S. 17, 48-49.

In spite of this admonition, the District Court limits the testimony of the experts from Modern Transfer Co. and Highway Express Lines as to the way they go and why, as having little or no probative value. These P.U.C. companies which operate between the considered points can use any routes they want. They testified as to the use of U. S. Highway 309, wholly within Pennsylvania because it is "the most practical and economical."

The testimony of these witnesses was probative of the I.C.C. conclusion that the normal, logical and most economical route for a carrier to traverse going between Philadelphia and Allentown is through highways in Pennsylvania. The District Court by not permitting the I.C.C. to draw such inferences was improperly encroaching on the powers of the I.C.C.

It is pertinent to note that the District Court stated here "none of the basic facts are in dispute". In such event what was said in *Northwest Bar Corporation v. Board of Governors, etc.*, 303 F. 2d 832, 841, applies:

> "Where basic facts are not in dispute, it is then particularly true that the Board here, or a like governmental agency under similar situations, brings to bear its experience and its particular expert judgment. Radio Officers' Union v. N.L.R.B., 347 U.S. at 49, 74 S. Ct. at 340; Securities and Exchange Comm. v. Chenery Corp., 1947, 332 U.S. 194, 207-209; Board of Governors v. Agnew, 1947, 329 U.S. 441, 449-451; Republic Aviation Corp. v. N.L.R.B., 1945, 324 U.S. 793, 800; N.L.R.B. v. Link-Belt Co., 1941, 311 U.S. 584, 497; Cf. I.C.C. v. J.-T. Transfer Co., Inc., 1961, 368 U.S. 81, 93."

The Questions Are Substantial

The District Court creates as the nub of its decision a theory which the Jones company itself did not contend for, the record does not support, and the I.C.C. did not accept. The District Court theorizes that since the complaint sets forth 22 shipments which moved on several different trucks on four different days together with 108 other shipments between strictly interstate points that:

(1) that the Jones company had no other state freight shipments during that period of time;

(2) that Jones' traffic in state freight does not justify the use of a separate truck;

(3) that because Jones only has small amount of state freight cargo it is economical and practical for it to put them into trucks going into New Jersey which carry bona fide interstate freight.

The parties were not aware that the aforegoing assumptions were to constitute the theory of the case. The P.U.C. when it filed its complaint before the I.C.C. took the same 22 shipments that had been used before it previously when the P.U.C. had instituted a complaint before itself on its own motion.[2] The P.U.C. in gathering the evidence for the 22 shipments merely took 22 bills of lading from Jones' records at its headquarters in Spring City, Pennsylvania, showing transportation between the Philadelphia and Allentown areas. There was no attempt then, or at any time, to analyze how many like shipments were being handled daily or weekly, and what is the composition of the truck every time it leaves a Jones terminal in Allentown or Philadelphia. No such testimony was presented before the P.U.C. by Jones or any other party in the pres-

[2] This proceeding was eventually reversed by your Honorable Court for lack of jurisdiction, 361 U.S. 11.

ent I.C.C. proceeding or the P.U.C. proceeding, the record of which was lodged with your Honorable Court on certiorari proceedings. See 361 U.S. 11. When the matter came before the I.C.C., P.U.C. counsel made an effort to ascertain from Jones how much traffic that company was handling between the considered points in Pennsylvania, Jones' witness did not have it. See N.T. 172 through 178. Jones' counsel specifically stated that "whether the volume be great or small has no bearing" (N.T. 175). Jones' only witness testified that the only reason his company utilized the New Jersey routes for state freight was solely because "that is the way we know we are authorized," and for no other reason, N.T. 191. Yet the District Court uses the happenstance of 22 shipments which happened to move with a total of 108 shipments in those particular trucks on four days as the basis for creating for Jones a theory of practicality and economy.

There was no evidence before the I.C.C. as to how many other state freight shipments Jones had to transport on the days it delivered the 22 shipments. There was no inquiry into it. The 22 shipments were obtained at random from a sampling review of bills of lading at Jones' plant. Jones, if anything, prevented an inquiry into this and acknowledged that the volume had no bearing. Without going into the relevancy at this point, suffice it to say that the case obviously was not tried on this issue, and the I.C.C. had no evidence upon which it could make any findings with reference to how many state freight shipments were being handled by Jones on May 1, 2, 24 and June 28, 1957. The issue as recognized by counsel was **not how many or few there were on a particular day, but whether they could or could not do it at all!**

The Questions Are Substantial

The District Court, without the basis of evidence or findings by the I.C.C., creates this practicality theory based upon assumptions from a coincidental ratio of 22 state freight shipments to 108 interstate shipments. The kernel of the theorizing is set forth in the second District Court opinion of November 21, 1963, as follows:

> "It seems to be logical and normal for Jones to carry the comparatively few Philadelphia to Allentown shipments, shown on the record, on its 96 mile trip rather than to delay these few shipments for several days until a larger quantity could be dispatched over a route wholly within Pennsylvania."

There is not one word of testimony from Jones' witness that it had to transport these 22 shipments 96 miles in order to prevent delay. On the contrary, Jones' witness tells us his company took them 96 miles because that is the only way it can get away with it, he hopes. **It certainly couldn't go straight through Pennsylvania under any theory of the law.**[3] There is not one bit of evidence from him that it was necessary to pick up these 22 shipments in order to make a full truckload, the rest being interstate shipments, like the testimony in the *Service* case. As far as we know Jones on one day may send a whole truckload of goods from Philadelphia to Allentown completely full of state freight and on another occasion mix the freight up! But what is important, however, is that Jones is engaging in a substantial volume of business between points in Pennsylvania. How much it carried on a particular truck on a given night was never consid-

[3] Jones could go through Pennsylvania over the Pa. Turnpike under the Deviation Rules only for bona fide interstate cargo.

ered material by any of the parties or the I.C.C. The District Court, however, builds on the happenstance ratio of the particular shipments a theory of practicality. This method of judicial review is contrary to the scope of review set down in your decisions time without number.

Moreover, what is more surprising is the basis for the District Court's reasoning. **It reasons that if an I.C.C. motor carrier is carrying interstate freight and it has room on its truck for state freight, it can then put the state freight on the truck although it has no certificate from the State to do this.** Apparently, the District Court concedes *sub silentio* that an I.C.C. motor carrier such as Jones could not carry a full truckload of state freight from Philadelphia to Allentown. However, even with this premise Jones disagrees because its counsel at the argument before the Bar of the Court on Reconsideration on October 11, 1963, specifically answered the Court that it was their position that they could legally carry a full truckload of state freight without mixing over the routes in New Jersey. The District Court has therefore invented a theory for Jones of partial truckload that Jones itself has not put forward and is not even willing to accept!

The District Court's revolutionary theory is[4] that an I.C.C. carrier carrying interstate freight can pick up state freight if there aren't too many. Just how many is within permissible limits the Court does not say. This entire theory is not only illogical in that it justifies the doing of an unlawful act by combining it with the doing of a lawful act, and **it sanctions doing indirectly what the carrier**

[4] As we understand it.

cannot do directly, but it is completely contrary to the rules of law your Honorable Court has frequently enunciated in such matters.

For example, in *Interstate Busses v. Holyoke Ry.*, 273 U.S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530 (1927), your Honorable Court said, referring to an analogous situation:

> "It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonable, practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees."

The theorizing of the District Court flies completely in the teeth of the rules of law set forth in the *Holyoke* case.

The District Court adds further flames to the fire of error it created by quoting from the findings of the Hearing Examiner as if the Hearing Examiner had been endowed by Congress as a parallel body to the I.C.C. The Hearing Examiner had reached the conclusion that there was no subterfuge and recommended dismissal of the complaint. The I.C.C. ignored the inferences and conclusions as well as the reasoning process of the Hearing Examiner and in its 19-page opinion adopted its own infer-

ences and conclusions sustaining the complaint. The District Court instead of seeking to review the inferences and conclusions of the I.C.C. as they stand against the record, erroneously accepts the inferences and conclusions of the Hearing Examiner which were expressly or impliedly overruled.

This approach by the District Court was error of law. Under the Administrative Procedure Act, 5 U.S.C. §1007-(a), the agency on appeal from or review of the initial decision of the Hearing Officer has

> "**All** the powers which it would have in making the initial decision."

The inferences and conclusions of the Hearing Examiner are therefore entitled to no weight in a Court of Law where the I.C.C. draws its own and sets them forth in a comprehensive opinion. In fact, your Honorable Court has often said, as illustrated in your decision in *Radio Corporation vs. Nelson Brothers*, 289 U.S. 266, at p. 285:

> "Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was **required** to reach its own conclusions upon the evidence."

When the I.C.C. does reach its own conclusions, the District Court's duty in reviewing the order is limited to the task:

> ". . . of determining whether the **conclusion of the Commission** 'finds support in the record as a whole' * * * 'even though the court would justifiably have made a different choice had the matter before it been de novo.'" (cases cited)

Herrin Transportation Co. v. U.S., 366 U.S. 419, affirming per curiam, 186 F. Supp. 777.

In this case the District Court may have fallen into the error by believing that when the I.C.C. said in its opinion that "the statements of facts in the examiner's reports (are) correct and we adopt them as our own," that the I.C.C. was also adopting all the inferences and conclusions of the Hearing Examiner. This, of course, could hardly be the case since the I.C.C. drew inferences and conclusions which were diametrically opposite those of the Examiner. All that the I.C.C. intended by that statement was a mere recognition of what it said at the outset of its Opinion, namely, that "The material facts are not in dispute," which was the same observation that the District Court itself made when it said: "The basic facts presented to the Hearing Examiner were either the subject of a stipulation or were not disputed."

But notwithstanding that the I.C.C. works with the same basic facts as the Hearing Examiner, it has all the power which it would have in making the initial decision and the inferences and conclusions of the Hearing Examiner can be entirely rejected and disregarded. The review by the District Court in such event remains the same. In the *Herrin* case a similar situation was present and it was there said in disposing of this point:

> "Giving color to this argument is the fact that the Commission, while adopting the many factual statements of the Hearing Examiner, rejected the recommendations of the Examiner and reached a directly contrary result. In assaying the substantiality of the evidence supporting the Commission's action,

our[s] is the limited task of determining whether the conclusion of the Commission 'finds support in the record as a whole. . . .' "

The District Court's acceptance of inferences and conclusions of the Hearing Examiner is clearly in error.

What was said in *Securities & Exchange Commission v. Chenery*, 332 U.S. 194, at p. 209, equally applies here:

> "The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the case of the administrative process. See Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 800: *Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.*" (Italics added.)

(c) The District Court was also in error in not remanding the case to the Interstate Commerce Commission for action upon P.U.C.'s request for reopening of the record.

In the I.C.C. decision the I.C.C. makes note of our argument as follows:

> "That the entire pattern of Jones' operations between Philadelphia and points in the Allentown area

involves the substantial transportation on a regular nightly basis of shipments having origin and destination within Pennsylvania rather than, as reasoned by the examiner, the commingling of a small number of incidental shipments with a large number of shipments which moved from or to points without Pennsylvania; that the specification of 22 shipments in the complaint was intended to relate to an unlawful course of action by Jones, and no attempt was made to establish the percentage relationship of within Pennsylvania shipments to shipments outside Pennsylvania handled by Jones; . . ."

The I.C.C. also refers to the fact that:

"Included in the respective exceptions of P.U.C., are requests for reopening of the records or for further hearing, so as to admit claimed erroneously excluded evidence and new evidence in No. MC-C-2797, and to develop properly the record in No. MC-C-2732, in the event that the ratio test of within-Pennsylvania shipments to outside-Pennsylvania shipments is to be determinative of the issue of subterfuge in that proceeding."

The I.C.C. went on to say:

"It is doubtful that any of the new evidence which P.U.C. proposes to present would have any bearing on the outcome of the proceeding, and in view of the long pendency of these proceedings and our conclusions, the requests of P.U.C. for reopening the records are denied."

The I.C.C. denied our requests for reopening of the record for development of the ratio test because on the

basis of its "conclusions", the ratio test was immaterial. However, the District Court bases its decision on the ratio of state freight to interstate freight. If this is a valid theory for decision, then the case should be remanded to the I.C.C. for a decision as to whether it would reopen the record, realizing now that the ratio test is material. The P.U.C. can hardly be blamed for failing to bring in evidence which all the parties conceded at the hearing was immaterial. For the proper administration of justice, when the District Court adopts a new theory upon which neither party tried its case, an opportunity should be afforded the agency to determine whether a sufficient opportunity was given the parties for the presentation of that kind of evidence.

In view of the P.U.C.'s request for reopening the record and the specific basis set forth thereof in the I.C.C. opinion the District Court should, at the least, have remanded the record for action on our motion in light of the new legal principles established by its decision.

CONCLUSION

The instant case, as well as the *Hudson* and *Arrow* cases, and several cases presently pending in the District Court of New Jersey, are test cases for the P.U.C. in its fight to stamp out what amounts to pirating of intrastate business by I.C.C. carriers.

Pennsylvania, like many other States, is so located that without too much difficulty a motor carrier can

travel into nearby states in performing transportation services for shippers and consignees wholly within the State. The practices seen in cases pending before your Honorable Court are only a small view of the kind of pirating going on. In actuality, the so-called subterfuge being conducted here is as rampant and flourishing as a tumor or growth.

If the proper rules of decision are not laid down in these test cases to enable State and Federal agencies to stamp out this malignancy, a serious question will remain whether there is effectiveness in state regulation at all. The decision by the District Court for the Eastern District of Pennsylvania opens the door wide to subterfuge and must be reversed if proper regulation is to take hold.

The questions presented by this appeal are substantial and require plenary consideration, with briefs and oral argument for their resolution.

Probable jurisdiction should be noted.

Respectfully submitted,
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APPENDICES

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 32629

Jones Motor Co., Inc.

v.

The United States of America

and

The Interstate Commerce Commission

OPINION AND ORDER

Before: Ganey, *Circuit Judge*, and Wood and Joseph S. Lord, III, *District Judges*

By: Wood, *District Judge*

Plaintiff, an interstate motor carrier certificated by the Interstate Commerce Commission, but without a certificate granted by the Pennsylvania Public Utility Com-

mission, covering the specific operation in question, commingled 22 Pennsylvania shipments with 108 other shipments, admittedly interstate in character, and transported these 130 shipments over routes through the State of New Jersey.

On May 1, 2 and 24, and June 28, 1957, these 22 shipments, destined for points in Pennsylvania, were moved from Philadelphia, over U. S. Highway 1 to Trenton, thence over New Jersey Highway 69 to Clinton, thence over U. S. Highway 22 to Allentown, and return movements were over the same routes. The plaintiff operated between Philadelphia and the Allentown, Pennsylvania area over the described routes by tacking its two interstate authorities.[1]

The basic facts presented to the Hearing Examiner were either the subject of a stipulation or were not disputed. Plaintiff is primarily an interstate carrier but also operates its lines between other Pennsylvania points with permits issued by the Pennsylvania Public Utility Commission.

During the period previously referred to, Jones Motor Co., Inc., hereinafter referred to as "Jones," con-

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[1] Jones' Certificates are as follows:

"(a) *Between* Philadelphia, Pa., and New York, N. Y., over U. S. Highway 1, serving all intermediate points, including Trenton, N. J., and off-route points, including 35 miles of Princeton, N. J., and

"(b) *Between* Elizabeth, N. J., and Allentown, Pa., via U. S. Highway 22 and New Jersey Highway 23, serving all intermediate points, including Clinton, N. J., on U. S. Highway 22, and serving off-route points in Pennsylvania within 25 miles of Allentown, Pa."

ducted daily operations between Allentown and Philadelphia over the specified route via Clinton, New Jersey. The shipments involved moved over these routes at night and there were no pickups, changing of freight from one vehicle to another, or any business or terminal stops in New Jersey. This was a terminal to terminal operation by Jones with distribution or pickups by Jones via peddle runs to and from intermediate points and points in the area served by it, or Jones connected with an interline carrier where points beyond were involved. Jones also transported over the same route other movements of the same consignors and consignees as are involved in the shipments covered by this action.

The night operation is the only scheduled run between Allentown and Philadelphia, but operations were also conducted during this period, wholly or partially over this route, but not on a scheduled basis, during daytime—pickups and deliveries being made directly by Jones from and to points in New Jersey. The involved routes used by Jones and rates pertaining to all the shipments involved in this action were published in appropriate tariffs filed with the Commission. No effort was made by Jones at any time to conceal its manner of operation over the involved route. Jones' solicitors are stationed at Allentown and Philadelphia and at the time covered by this action traffic was solicited for freight forwarders, steamship companies, export, for traffic having both origins and destinations in Pennsylvania, and for interline carriers with which it had published through routes and rates.

Jones was denied authority by the Pennsylvania Public Utility Commission (P.U.C.) to operate between the

Philadelphia and Allentown areas over routes wholly in Pennsylvania on July 21, 1955. On or about August 5, 1957, the P.U.C. initiated a Complaint against Jones. The P.U.C. heard its own Complaint and sustained it by its own decision and issued a Cease and Desist Order against Jones Motor Co., Inc. (Docket C-16813). Jones then appealed through the Pennsylvania Appellate Courts[2] without success.

Following this series of events, Jones petitioned the United States Supreme Court for a Writ of Certiorari, which Court granted the Petition and reversed the judgment of the Superior Court of Pennsylvania in Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission, 361 U.S. 11 (1959), a per curiam opinion which cited Service Storage and Transfer Co. v. Virginia, 359 U.S. 171 (1959). The United States Supreme Court denied the P.U.C.'s Petition for Reconsideration and Clarification, wherein it prayed the Court "to file a clarifying opinion or memorandum order expressly stating that the judgment of the Court below was reversed on jurisdictional grounds without regard to the merits of the controversy in the instant cause." 361 U.S. 904 (1959).

Thereafter, the P.U.C. filed a Complaint with the Interstate Commerce Commission docketed by the Commission at MC-C-2732, naming Jones as defendant. This Complaint averred that the operations by Jones in transporting property between certain Pennsylvania points over routes lying partly in New Jersey were beyond the

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[2] Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission, 188 Pa. Superior Ct. 449 (1959); Allocatur refused by the Pennsylvania Supreme Court, 123A. Misc. Docket.

scope of its certificated authority and requested the issuance of a Cease and Desist Order.

Jones filed a Motion to Dismiss the Complaint at MC-C-2732 with the Interstate Commerce Commission (I.C.C.) predicating that Motion upon the doctrine of *res adjudicata* and on the merits. The Motion was denied by the I.C.C. A hearing was held before the Examiner in Philadelphia on February 8, 1961 and Jones renewed its Motion to Dismiss. On September 28, 1961, the Examiner filed his "Corrected Report and Recommended Order", finding that Jones was performing authorized transportation between points in Pennsylvania through points in New Jersey, recommending the dismissal of the Complaint against Jones at MC-C-2732 on the merits, but denying the Motion to Dismiss which was presented formally at the outset of the hearing.

As previously stated, none of the basic facts are in dispute, and they were admitted by Jones in stipulations of fact.

Stated *seriatim* the Examiner concluded that:

1. The longer circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge,[3] and

[3] It was stipulated between counsel that the routes traversed by Jones between Philadelphia and Allentown, terminal to terminal, covered a distance of 96.2 miles and the driving time is three hours. Between the same points over U. S. Highway 309, lying wholly within Pennsylvania, the distance would be 55 miles and the driving time two hours, five minutes.

Over the Pennsylvania Turnpike between the same points, wholly within Pennsylvania, the distance would be 74.9 miles and the driving time is one hour, fifty minutes.

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2. There existed "logical," "practical" and "feasible" reasons "* * * from the standpoint *of operating efficiency and economy*, for a carrier to include in the same vehicle with 108 shipments, which are admittedly in interstate commerce and moving over routes specified in its interstate certificates, 22 other shipments, over a period of four specified days, which, if defendant (Jones) had held the appropriate authority, might technically have been moved by themselves over a shorter route.

"* * * It would not have been likely for defendant (Jones) to move an average of 5 shipments per day on four different days over this route, by themselves, while moving other shipments the same days in the same area in other vehicles via different routes it had to use for these other shipments, * * *" and

3. The tacking by Jones of its two interstate authorities[4] was proper as no restrictions against operations between Allentown and Philadelphia were imposed when the certificate of public convenience and necessity giving rise to such authority was granted, and

4. Jones' operations between two points in Pennsylvania, via New Jersey are physically in interstate

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[4] See note 1, supra, for a description of Jones' I.C.C. authorities. The following points are pertinent in this matter: Clinton, N. J. is within 35 miles of Princeton, N. J. and the Pennsylvania points of Easton and Bethlehem were served as intermediate points on U. S. Highway 22, Catasauqua, Pa. and Emmaus, Pa., other points mentioned in the Complaint, are within 25 miles of Allentown; Chester, Pa. is within the Philadelphia commercial zone, and Hatboro, Pa. was served via an unnumbered highway between Hatboro and Philadelphia.

commerce, and fall within the purview of the operating authorities contained in Jones' certificates which specifically described the operations authorized therein as transportation in interstate commerce, and

5. No showing had been made that the operations of Jones under its Certificates were not bona fide.

Following this decision the P.U.C. and the Intervenors filed exceptions and supplemental exceptions. Jones replied to all of these exceptions on December 8, 1961. On June 5, 1962, the I.C.C., through Division 1, issued its "Report of the Commission," (see 89 M.C.C. 605), reversing the Examiner, finding that the transportation by Jones constituted a subterfuge and was not authorized by its Certificate and appended a Cease and Desist Order to become effective July 23, 1962. Reconsideration was denied and Division 1, acting as an Appellate Division, by Order of December 4, 1962, denied Jones' Petition and established January 25, 1963 as the effective date of its prior Cease and Desist Order. The "Report of the Commission" and the Order of Division 1, acting as an Appellate Division, consolidated the Complaint against Jones Motor Co., Inc., at MC-C-2732 with another Complaint brought before the I.C.C. by the P.U.C. against National Freight, Inc. and Victory Transportation, Inc., docketed at MC-C-2797, without the proceedings having been consolidated for any purpose whatsoever.

Jones then filed the instant Complaint with this Court seeking a reversal of the Order in question.

We agree with the plaintiff that the Commission's Order is not supported by substantial evidence and must be reversed.

It is interesting to note that the Commission in its Report at p. 612 adopted the Examiner's statement of the facts, and rulings on evidence, such as, his allowance of certain exhibits which proved the interstate character of the other 108 shipments commingled with the challenged 22 shipments from the same consignors destined for Pennsylvania points. Division 1 also agreed with the Examiner's finding that the tacking by Jones of its two interstate authorities was lawful and proper (p. 613).

In the two cases involving National Freight, Inc. and Victory Transportation, Inc., combined with Jones, the Commission noted that Victory obtains 75 percent of its revenue in handling freight originating in the Philadelphia area to other points in Pennsylvania without any authority from the P.U.C. (p. 614), while Jones stated at the hearing on this matter that less than five percent of its business concerns such challenged transportation (N.T. 13-14).

While it is stipulated that all of these shipments were routed through New Jersey, and were therefore on their face interstate[5] shipments, the P.U.C. and the I.C.C. take the position that they were clearly intrastate because they could have been moved over direct routes, thereby never leaving Pennsylvania. Service Transfer Co. v. Virginia, 359 U.S. 171, 175 (1959).

The only testimony offered to prove bad faith or subterfuge were the statements by officers of the intervenors, Modern Transfer Co. and Highway Express Lines, as to

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[5] 49 U.S.C.A. §303(10) defines "interstate commerce" as including "commerce * * * between places in the same state through another state * * *", 49 Stat. 544.

the use of Pennsylvania routes by their companies because they were more logical and practical for *their* operation. Also, there was testimony by a Mr. Duffy who had a conversation with one of Jones' drivers who stated that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above. An investigator for the P.U.C. gave testimony which the Examiner regarded as merely cumulative to Mr. Duffy's testimony and unrelated to any date mentioned in the Complaint.

Apart from this testimony offered by the P.U.C. to support its position that Jones' routes were circuitous, and somewhat long, no direct evidence of bad faith on the part of Jones was offered by the P.U.C. Service Transfer Co. v. Virginia, supra, p. 175.[6]

Conversely, Jones was specifically authorized to combine its Certificates in proceedings at MC-F-4955 by these words:

> "Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to Operate under the operating rights granted in No. MC-108161, which rights are herein authorized to be unified with rights

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[6] The Supreme Court dealt with this identical situation with these words:

> "* * * Aside from the testimony of highway officers as as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia."

otherwise confirmed in it and to be embraced in a certificate in its name, with duplications eliminated * * *"[7]

Jones also proved that it provided a complete and economical transportation service to its customers by Exhibits 7, 8, 9 and 10, which show that the same consignors are served at the same time on traffic going to other points and that all of this traffic can be picked up at one time. By this nightly terminal to terminal road run Jones can assure its customers morning delivery via local peddle runs which would be handled in the daytime because the businesses then would be open to receive freight (Ex. 12).

The burden of proof on the subterfuge question is placed upon the P.U.C., not on Jones which admittedly is operating under validly combined Certificates. Since the Commission, in its Order, bottomed its finding of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's "Corrected Report and Recommended Order."

While it is solely within the province of the Commission to determine that any carrier has *abused* its Certificate[8] such *abuse* is not shown when a carrier makes an authorized use of his unrestricted certificates which the Commission admits are validly tacked. The Commission's Order really says that while Jones is making an authorized use of its validly tacked certificates such use was *unforeseen* by the Commission when it granted Jones this

[7] Modern Transfer Co., Intervenor herein, was a protestant to the acquisition by Jones of this Sub 7 authority (Ex. 5).

[8] Service Transfer Co. v. Virginia, supra, at p. 179.

authority. If the Commission feels that this *unforeseen* use violates the law of Pennsylvania, proper procedures are available to correct this situation. Congress has provided the remedy in 49 U.S.C.A. §312(a), which states in part as follows:

> "* * * Any such certificate, permit or license may, * * * upon complaint, or on the Commission's own initiative, after notice or hearing be suspended, *changed*, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder * * *"

In Castle v. Hayes Freight Lines, 348 U.S. 61, 65 (1954), the Supreme Court construed the above section 312(a) as follows:

> "* * * If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state."

This doctrine was reaffirmed by the Supreme Court in Service Transfer Co. v. Virginia, supra.

Therefore, the Commission cannot by its Order take away from Jones part of its certificated authority without following the direction of Congress as contained in 49 U.S.C.A. §312(a), which provides the appropriate remedy to protect a state's interests by changing a certificate *in whole or in part*.

Appendix "A"

ORDER

And Now, this 4th day of June, 1963, It Is Ordered by this Court that the Order of the Interstate Commerce Commission requiring Jones Motor Co., Inc. to Cease and Desist from the challenged operations between points in Pennsylvania through points in New Jersey is Reversed.

By the Court,
(s) Harold K. Wood
J.
(s) Joseph S. Lord, III
J.

Ganey, *Circuit Judge*, dissenting.

A judicial review of the Order of the Interstate Commerce Commission is limited to the inquiry of whether or not there is a rational basis for the conclusions reached and approved by it. Illinois Central Railroad v. Interstate Commerce Commission, 206 U.S. 441, 454-455; United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535-536.

The facts material to the disposition of the issue here in question are not in dispute. Shipments, approximating some 22 in number, were made during the months of May and June, 1957, by the plaintiff between points in Pennsylvania to certain other points in Pennsylvania. Eleven of these shipments were made from Philadelphia to Allentown, 4 from Easton to Philadelphia and Hatboro, 3 from Bethlehem to Philadelphia, 1 from Chester to Bethlehem, and the others to points from Philadelphia to points within 25 miles of Allentown. To give an example of the ship-

ments, the majority of them moved from Philadelphia over the Tacony-Palmyra Bridge, over U. S. Highway 1 to Trenton, from there over New Jersey Highway 69 to Clinton and then over U. S. Highway 22 to Allentown, which has been designated the Clinton Route. The terminal to terminal distance from Philadelphia to Allentown over this route is 96.2 miles and the driving time is three hours, whereas the driving time between Philadelphia and Allentown over U. S. Highway 309, within Pennsylvania, is two hours, five minutes, and over the Pennsylvania Turnpike, a distance of 75 miles, the driving time would be one hour, fifty minutes. These shipments were made at night and left Philadelphia traversing the route here indicated, making no stops whatsoever en route, either at Trenton or at Clinton— the terminal at Clinton no longer was in existence, it having been closed more than nine years previously—for any pickups or deliveries. The goods in question were mingled with other goods destined for points beyond Pennsylvania, but after traversing the certificated route of the Commission, the first stop was made in Allentown and the goods destined for delivery there were removed and the balance of the shipment continued on. The record discloses no logical reason or economic purpose for the carrying of the goods across the state line into New Jersey on a certificated route and, accordingly, the Commission reached the conclusion that the transportation was merely subterfuge to avoid compliance with the Pennsylvania Public Utilities Commission regulation which had denied to plaintiff a certificate.

The majority relies heavily on Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171. There, the shipment of goods was from Virginia into West Virginia

and back again to Virginia for delivery within the State of Virginia. However, there was a principal terminal of the company in Bluefield, West Virginia, where the truck stopped, pickups were made, deliveries were made and the goods, together with other interstate shipments, were returned into Virginia for delivery. Here, there was good reason, as well as economic purpose, in making the transportation, because other goods were picked up in Bluefield and deliveries made therefrom. Full loads were then made up and carried back into Virginia and on into other states, as contrasted with the non-stop performance of the truck, in this instance, going directly from Philadelphia to Clinton and back into Pennsylvania to Allentown.

While there can be no denial that the concept of interstate commerce embraces a movement between points in one state through another state, the transportation so performed must not be in bad faith to escape the proper jurisdiction of the terminal state. Eichholz v. Public Service Commission of Missouri, 306 U.S. 268, 274.

It is submitted the report and order of the Commission represent a valid exercise of its authority and that they are predicated upon adequate evidence and findings and the Commission's actions should be sustained.

(s) J. Cullen Ganey,
Circuit Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 32629

Jones Motor Co., Inc.

v.

The United States of America

and

The Interstate Commerce Commission

OPINION AND ORDER ON REHEARING

Before: J. Cullen Ganey, *Circuit Judge*, and Harold K. Wood and Joseph S. Lord, III, *District Judges*

By: Wood, *District Judge*

On June 4, 1963, we reversed the Order of the Interstate Commerce Commission which had found the plaintiff motor carrier guilty of a subterfuge to avoid the jurisdiction of the Commonwealth of Pennsylvania.

Thereafter, we granted the defendants' petitions for rehearing and reconsideration on July 23, 1963. This rehearing was held on October 11, 1963.

The basis of our prior opinion and order was that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones.

When Jones carries shipments from states other than Pennsylvania to Allentown it must use its certificated route through Philadelphia and Clinton, New Jersey, to Allentown. It can use none other because this is the only authority it has from the Interstate Commerce Commission. This route is 96.2 miles long and the driving time is 3 hours, whereas the route from Philadelphia to Allentown via Route 309 is 55 miles and requires 2 hours and 5 minutes driving time. The only remaining route wholly within Pennsylvania is the Pennsylvania Turnpike, the distance being 74.9 miles and the driving time is 1 hour and 50 minates.[1]

It seems to be logical and normal for Jones to carry the comparatively few Philadelphia to Allentown shipments, shown on the record,[2] on its 96 mile trip rather than to delay these few shipments for several days until a larger quantity could be dispatched over a route wholly within Pennsylvania.

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[1] In Service Transfer Co. v. Virginia, 359 U.S. 171, 175 (1959), the circuitous routes utilized by the carrier were sometimes *twice* the shortest possible intrastate route. The driving times are not mentioned and apparently were not important.

[2] 22 in number.

Were Jones to split its operation to carry the questioned traffic on one truck via Route 309[3] which is 55 miles long and the remaining shipments over its 96 mile interstate route it would result in a combined total of 151 truck miles. This hardly seems practical and efficient from the standpoint of operating economy when one truck traveling 96 truck miles could carry all the shipments in one movement. Any increased fuel expense incurred by Jones in utilizing its interstate route would be offset by a saving in fewer drivers and trucks.

Since these 22 shipments are by definition "interstate"[4] and further, since 96 truck miles are preferable to 151 truck miles, we find no evidence of bad faith in the record of this proceeding.

For these reasons and those outlined in our prior Opinion, we dismiss the defendants' petitions for reconsideration.

ORDER

And Now, this 18th day of November, 1963, the defendants' petitions for reconsideration are dismissed and our Order of June 4, 1963 is affirmed.

(s) Harold K. Wood,
J.

(s) Joseph S. Lord, III,
J.

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[3] Assuming that Jones had Pennsylvania authority.

[4] Service Transfer Co. v. Virginia, supra, footnote 1.

Appendix "B"

J. Cullen Ganey, *Circuit Judge*, dissenting.

I dissent.

The distance between Philadelphia and Allentown, on appellant's certificated route—its authority from the Interstate Commerce Commission—is 96.2 miles. The intrastate distance between Allentown and Philadelphia on Route 309, an excellent highway, is 55 miles, a saving of some 41 miles if the appellant had the approval of the Pennsylvania Public Utility Commission. It is indisputable that the run from Philadelphia to Trenton and back to Philadelphia is a dry run in that no stops were made en route to Trenton nor at Trenton itself nor from Trenton to Philadelphia. Accordingly, this differs radically from Service Storage and Transfer Co. v. Virginia, 359 U.S. 171, where Bluefield, West Virginia, which would correspond to Trenton in the instant case, was a terminal point on the certificated route, where the truck stopped, goods were delivered from it and other goods taken aboard, which gave reason and substance for going there, all absent in the instant case. Here, the truck may well have been taken to Clinton, New Jersey, or the New Jersey side of the Tacony-Palmyra Bridge, both on the appellant's certificated route, and a much shorter distance, turned around and gone on to Allentown and there would have been as much substance to the trip as going many miles deeper into New Jersey to Trenton.

Conceding, as is obvious, that 49 U.S.C.A. §303(10) defines "interstate commerce" as including "commerce . . . between places in the same State through another State . . .", it must likewise be conceded that this action must not be construed in a vacuum, but that inherent in

the statute is the bona fides of the transaction or commerce and that merely a dry run traversing a portion of a certificated route without rhyme or reason cannot make the "commerce" interstate and thus enable it to avoid interstate regulation.

I can see no other reason for this bizarre performance other than as a subterfuge to avoid compliance with the Public Service Commission of Pennsylvania, and I reiterate the reasons set out in my original dissent.

(s) J. Cullen Ganey,
Circuit Judge

APPENDIX "C"

ORDER

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 4th day of December, A. D. 1962

No. MC-C-2732
Pennsylvania Public Utility Commission

v.

Jones Motor Co., Inc.

No. MC-C-2797
Pennsylvania Public Utilities Commission

v.

National Freight, Inc., and Victory Transportation, Inc.

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Jones Motor Co., Inc., defendant in No. MC-C-2732, filed July 10, 1962, for reconsideration and oral argument;

(2) Joint petition of National Freight, Inc., and Victory Transportation, Inc., defendants in No. MC-C-2797, filed July 11, 1962, for reconsideration;

(3) Reply by Motor Freight Express, intervener in No. MC-C-2797, filed July 16, 1962, to petition filed in (2) above;

(4) Reply by Pennsylvania Public Utility Commission, complainant, to petitions filed in (1) and (2) above;

(5) Joint reply by Highway Express Lines, Inc., and Modern Transfer Company, Inc., interveners in No. MC-C-2732, filed August 2, 1962, to petition filed in (1) above;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law, and that no sufficient cause appears for reopening the proceeding for reconsideration or for oral argument;

It is further ordered, That the order of June 5, 1962, as postponed pursuant to section 17(8) of the Interstate Commerce Act, be, and it is hereby, reinstated, and the effective date is fixed as January 25, 1963.

By the Commission, Division 1, Acting as an Appellate Division.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX "D"

INTERSTATE COMMERCE COMMISSION

No. MC-C-2732[1]

Pennsylvania Public Utility Commission

v.

Jones Motor Co., Inc.

Decided June 5, 1962

In each proceeding, defendant's transportation between points in Pennsylvania through points in New Jersey found to be a subterfuge for evasion of the laws of Pennsylvania, and not authorized by its certificate. Cease and desist order entered. Complaint in No. MC-C-2797 to the extent that the challenged operations are not subject to economic regulation, dismissed.

William A. Goichman, and Joseph I. Lewis, for complainant.

Christian V. Graf, William J. Wilcox, and Roland Rice for defendant in No. MC-C-2732.

[1] This report also embraces No. MC-C-2797, Pennsylvania Public Utility Commission v. National Freight, Inc., and Victory Transportation, Inc.

Christian V. Graf, and Davis Brodsky, for defendants in No. MC-C-2797

Paul F. Barnes, Robert H. Shertz, and Robert H. Young for interveners in support of complainant in No. MC-C-2732.

James H. Booser, for intervener in support of complainant in No. MC-C-2797.

REPORT OF THE COMMISSION

Division 1, Commissioners McPherson, Bush, and Tucker

Bush, Commissioner:

These proceedings were heard on separate records and were the subject of separate orders by the examiner; their issues are similar, however, and they will be disposed of here in a single report. In No. MC-C-2732 exceptions to the order recommended by the examiner were filed by the Pennsylvania Public Utility Commission, hereinafter sometimes called P.U.C. and jointly by Highway Express Lines, Inc., and Modern Transfer Company, hereinafter called Highway Express and Modern, and defendant replied. In No. MC-C-2797, separate exceptions to the order recommended by the examiner were filed by P.U.C. and by Motor Freight Express, hereinafter called Motor Express, and defendants replied. Our conclusions differ from those recommended. Points herein referred to are in Pennsylvania except where otherwise noted.

Appendix "D"

In No. MC-C-2732, by complaint filed November 20, 1959, and in No. MC-C-2797, by complaint filed February 26, 1960, P.U.C. alleges in essence that Jones Motor Co., Inc., and National Freight, Inc., and Victory Transportation, Inc., jointly, (1) are motor common carriers holding certain authorities issued by the Interstate Commerce Commission, and as such are subject to the provisions of the Interstate Commerce Act, and (2) have transported by subterfuge property by motor vehicle between certain points in Pennsylvania, over routes through New Jersey in the case of Jones, and over routes through New Jersey and Delaware in the case of National and Victory, without first having obtained appropriate certificates of public convenience and necessity from the Interstate Commerce Commission, as required by sections 203(c) and 206(1) of the Interstate Commerce Act, or from P.U.C., as required by sections 202(b) and (c) of the Public Utility Law of Pennsylvania. Complainant prays that the Commission issue an order in each proceeding requiring defendants to cease and desist from the alleged violations. Answer to the complaints were filed by defendants. Highway Express and Modern were permitted to intervene in support of the complaint in No. MC-C-2732, and Motor Express and The Pennsylvania Railroad Company were permitted to intervene in support of the complaint in No. MC-C-2797.

The material facts are not in dispute. The complaint in the title proceeding asserts and Jones admits, that on May 1, 2, and 24, and June 28, 1957, approximately 22 shipments were transported by Jones between points in Pennsylvania as follows: 11 from Philadelphia to Allentown and 3 points within 25 miles of Allentown, 4 from

Easton to Philadelphia and Hatboro, 3 from Bethlehem to Philadelphia, 1 from Chester to Bethlehem, single shipments from Emmaus and Catasauqua to Philadelphia, and 1 from Oaks was transported by defendant from Philadelphia to Bethlehem. The shipments moved to some extent over highways in New Jersey. Shipments from Philadelphia moved over U. S. Highway 1 to Trenton, N. J., thence over New Jersey Highway 69 to Clinton, N. J., thence over U. S. Highway 22 to Allentown, hereinafter called the Clinton route; and movements in the reverse direction were over the same route. The terminal-to-terminal distance between Philadelphia and Allentown over the route traversed by Jones is 96.2 miles, and driving time was 3 hours. Between the same points over U. S. Highway 309 within Pennsylvania, the distance is 55 miles, and the driving time, 2 hours and 5 minutes, and over the Pennsylvania Turnpike the distance is 75 miles with a driving time of 1 hour and 50 minutes. The challenged shipments moved on a daily night schedule operated by Jones between its Philadelphia and Allentown terminals over the Clinton route; and they were commingled with other freight which moved to, from, or between points without Pennsylvania. No stops for pickup and deliveries were made on the operations between the Philadelphia and Allentown terminals; peddle runs provided service from or to points served by Jones in the Allentown area, and from Chester and Oaks, and to Hatboro.

The Complaint in No. MC C-2797 alleges, and Victory and National admit, that on February 4, 1960, the transported 154 and 74 packages of mixed fruits and vegetables "fresh and green" and in approximately the same period, bi-weekly shipments of fresh fruits and vegetables in

mixed truckloads with meats, frozen citrus juices, and other manufactured edibles from Philadelphia to New Cumberland and Carlisle, Pa., respectively. These shipments moved to some extent over routes through New Jersey and Delaware: from Philadelphia over the Walt Whitman Bridge to Haddon, N. J. (adjacent to Camden, N. J.), thence south over U. S. Highway 130 through Brooklawn, Westville, and Paulsboro, N. J., to the Delaware Memorial Bridge, thence over the Delaware Memorial Bridge, and substantially direct specified highways in Delaware and Pennsylvania hereinafter called the Delaware route,[2] to Army Depot at New Cumberland and to Army War College at Carlisle. No stops were made to pick up or deliver freight at any intermediate points and the distance over this route from National's Philadelphia terminal to the New Cumberland destination is 127.4 miles, requiring 3 hours, 12 minutes driving time, and from New Cumberland to Carlisle is 21.8 miles requiring 37 minutes driving time. Over direct routes wholly within Pennsylvania including use of the Pennsylvania Turnpike between Valley Forge and Harrisburg, the distance from the Philadelphia origin point to delivery point in New Cumberland is 114.9 miles requiring according to a time schedule maintained by P.U.C. inspectors, 2 hours 30 minutes. The mileage between Philadelphia and Carlisle, over U. S. Highways 30, 230, 322, 22, and 11 wholly within Pennsylvania is 125.9 miles.

Modern and Highway Express each hold P.U.C. intrastate authority to perform the transportation of general

[2] For purposes of this report, the balance of the route need not be set out herein.

commodities between Philadelphia, and points in the Allentown area. They utilize U. S. Highway 309 which is the most direct route between Philadelphia and Allentown. Their vehicles average approximately 2 hours in driving time between Philadelphia and Allentown. Motor Express holds P.U.C., intrastate authority to transport general commodities between Philadelphia and New Cumberland. It interlines with another motor carrier in order to participate in the transportation of shipments between Philadelphia and Carlisle. The New Cumberland Army Depot is 4.7 miles from the Motor Express terminal at Harrisburg. Motor Express operates from Philadelphia to Harrisburg over U. S. Highway 30 and U. S. Highway 230, a distance of 107 miles. The driving time over this route by Motor Express is approximately 3 hours and 5 minutes. It also utilizes the Pennsylvania Turnpike between Philadelphia and Harrisburg, and its driving time over this route is about 30 minutes less than over its U. S. Highway 30-230 route.

Pertinent Authorities of Defendants—None of the defendants hold intrastate authority to operate within Pennsylvania. Jones, defendant in No. MC-C-2732, is a motor common carrier holding certificates from this Commission in Nos. MC-4963 and MC-4963 (Sub-No. 7). The former, as pertinent, authorizes the transportation of general commodities, with exceptions, between Philadelphia and New York, N. Y., over U. S. Highway 1, serving all intermediate points, and points within 35 miles of Princeton, N. J., as off-route points. The Sub No. 7 certificate was issued upon the purchase by Jones of the operating rights of another carrier, and authorizes the transportation of general commodities, with exceptions, between Allentown and

Elizabeth, N. J., over a regular route, from Allentown over U. S. Highway 22 to junction New Jersey Highway 28 near Raritan, N. J., thence over New Jersey Highway 28 to Elizabeth, and return over the same route. Service is authorized at all intermediate points on this route, including Clinton, and all off-route points within 25 miles of Allentown. The foregoing authorities have been tacked at Clinton, a service point within 35 miles of Princeton and common to both routes, to provide a basis for service by Jones between Philadelphia, on the one hand, and on the other, points in the Allentown 25-mile area over the previously-described Clinton route.

Jones maintains two solicitors in Philadelphia and the same number in Allentown who each solicit all available traffic. It admittedly operates nightly schedules over the Clinton route to transport shipments between Philadelphia and Allentown because it is certain of its authority to operate over such route. It had previously filed with P.U.C. an application for authority to operate between Philadelphia and Allentown over highways entirely within Pennsylvania, but its application was denied.

Victory and National, defendants in No. MC-C-2797, hold certificates to operate as common carriers of general commodities, with exceptions. Victory's certificate embraces operations over irregular routes between points in Gloucester County, N. J., on the one hand, and, on the other, points in Pennsylvania; and National's certificate, as pertinent, authorizes operation between Philadelphia and New York City over regular routes, among others, from Philadelphia across the Delaware River to Camden, thence over U. S. Highway 130 to junction unnumbered highway (formerly New Jersey Highway 37) at or near

Yardville, N. J., thence over unnumbered highway to junction U. S. Highway 206, thence over U. S. Highway 206 to Trenton, N. J., thence over U. S. Highway 1 to Jersey City, N. J., thence across the Hudson River to New York City, and return over the same route, serving all intermediate points and points within 35 miles of Philadelphia as off-route points. By combining the above-described operating authorities at Brooklawn, a point on U. S. Highway 130 south of Philadelphia, National and Victory have performed the challenged transportation in an interline service without stops at intermediate points to pick up and deliver freight, and without commingling with shipments originating at, or destined to, points outside Pennsylvania. The described operations were commenced by National and Victory in May 1957. The described shipments are among those handled under contract with the U. S. Government, on government bills of lading, and pursuant to perishable subsistence rate tenders under the provisions of section 22 of the Interstate Commerce Act. Reba Shuman, President and a director and stockholder of Victory, is the sister of Bernard Brown who was president and stockholder of National at the time of the movement of the challenged shipments. Since then Brown has disposed of his interests in National and National and Victory no longer have stockholders or officers with interests in common. They, however, are continuing the transportation pattern of which the challenged transportation is an example and Victory, as the delivering carrier, receives 75 percent of the revenue therefrom. Victory and National jointly hold themselves out to transport traffic between Philadelphia and other points in Pennsylvania via interstate routes.

Appendix "D"

The examiner recommended that both proceedings be dismissed. In No. MC-C-2797, he found that the challenged transportation of fresh or green fruits and vegetables in straight truckloads is exempt from economic regulation by this Commission, that no operating authority therefor is required from this Commission, and that there can be no violation of the certificate requirements of the Act in the performance of this portion of the challenged transportation.[3] The examiner found that otherwise in No. MC-C-2797, and found in the title proceeding, that defendants lawfully were performing transportation authorized by their respective certificates.

Exceptions and Replies—In separately filed exceptions in each proceeding, P.U.C. and the interveners contend, in essence, that the examiner erred (1) in finding that the challenged transportation is bona fide, logical, and lawfully authorized by the defendants' operating authorities; (2) in ignoring the tests of subterfuge as laid down by the courts; (3) in concluding that Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 83 M.C.C. 729, hereinafter called the Hudson case, does not form a basis for a finding of subterfuge in the instant proceeding; and (4) in dismissing the complaints. They argue that if the examiner's findings are approved, regulation by Pennsylvania over intrastate traffic would become

[3] Transportation of straight shipments of fresh and green fruits and vegetables falls within the partial exemption provided by Section 203(b)(6) of the act if no other property and no passengers are transported on the same vehicle for compensation. Therefore, no authority is needed for its transportation in interstate commerce unless transported in vehicles with non-exempt commodities which as noted, is a second type of transportation performed by these defendants.

chaotic because many carriers by tacking to form interstate routes would be able to provide competition with Pennsylvania-authorized carriers for available traffic moving between points in Pennsylvania without having filed applications for appropriate authority with either P.U.C. or this Commission and without having shown a public need for additional service. More specifically, in No. MC-C-2732, they argue that the examiner uses tenuous and illogical factual distinctions to avoid the implications of the Hudson case; that the entire pattern of Jones' operations between Philadelphia and points in the Allentown area involves the substantial transportation on a regular nightly basis of shipments having origin and destination within Pennsylvania rather than, as reasoned by the examiner, the commingling of a small number of incidental shipments with a large number of shipments which moved from or to points without Pennsylvania; that the specification of 22 shipments in the complaint was intended to relate to an unlawful course of action by Jones, and no attempt was made to establish the percentage relationship of within Pennsylvania shipments to shipments outside Pennsylvania handled by Jones; and that the challenged transportation is performed as a subterfuge to evade State regulation.

In No. MC-C-2797, P.U.C. and intervener specifically argue that the contrast used by the examiner between the only slightly greater difference in mileage and driving time when operating over the Delaware route with the mileage and driving time over the routes entirely within Pennsylvania misapplies the rule pronounced in the Hudson case, and is not a sound and proper criteria to find that defendants are engaged in a bona fide operation in

interstate commerce; that there is no logical reason for the moving of the "State" freight over the Delaware route other than defendants' lack of intrastate authority to move it over direct routes wholly within Pennsylvania; and that defendants should be enjoined from performing the challenged transportation.

P.U.C. also renews contentions made at the hearing and on brief in No. MC-C-2732 that the examiner erred in failing to correct adverse rulings pertaining to admission of certain exhibits introduced by defendant of abstracts of its shipments purporting to show that the considered within-Pennsylvania movement was small in volume when contrasted with the claimed large volume of shipments to and from points without Pennsylvania, all carried in the same truckload. P.U.C., and intervener also contend in both proceedings that the examiner erred, (1) in failing to admit into evidence certain oral testimony by adverse witnesses, and (2) in restricting their cross-examination. Included in the respective exceptions of P.U.C., are requests for reopening of the records or for further hearing, so as to admit claimed erroneously excluded evidence and new evidence in No. MC-C-2797, and to develop properly the record in No. MC-C-2732, in the event that the ratio test of within-Pennsylvania shipments to outside-Pennsylvania shipments is to be determinative of the issue of subterfuge in that proceeding.

In their replies, defendants take direct issue with the matters raised on exceptions. They argue, generally, that the challenged tacking of their operating authority is lawful under the doctrine set forth in Aetna Freight Lines, Inc., Interpretation of Certificates, 48 M.C.C. 610; that the findings of the Commission, division 1, in the Hudson

case, do not provide governing law for the disposition of these proceedings because petitions for reconsideration[4] have been filed in that proceeding; that the Commission has found, and courts have held, consistently, that transportation between points in the same State over routes through another State are in interstate commerce, citing Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 780, and Roundtree v. Terrell, 22 F. Supp. 29; that the challenged transportation has been performed openly and lawfully without subterfuge; and that complainant and interveners have failed to prove subterfuge on the part of defendants.

Defendants refer to Service Storage and Transfer Co., Inc.,-Declaratory Order, 71 M.C.C. 304, and Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia, 359 U.S. 171, as authority for the proposition that although their routes are circuitous and the driving time thereover unnecessarily long, without direct evidence of bad faith, these factors cannot amount to subterfuge. Defendant in the title proceeding also argues that the decisions rendered by the Supreme Court in the Service case, supra, and in Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission, 361 U.S. 11, were not merely jurisdictional determinations as stated by division 1 in the Hudson case, but constituted decisions of the basic issues presented therein which govern the issues in the proceeding against it; and, in this connection, it renews its mo-

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[4] Since the filing of replies herein, the entire Commission on March 19, 1962 has issued its report on reconsideration in the *Hudson* case. On May 1, 1962, the United States District Court for the district of New Jersey entered a temporary restraining order staying the effective date of May 7, 1962, until such time as the Three Judge court enters judgment in the case.

tion to dismiss that complaint on the doctrine of *res adjudicata*.

A careful review of the record, the recommendations, the exceptions, and the replies thereto discloses the statements of facts in the examiner's reports to be correct and we adopt them as our own. No one excepts to that part of the examiner's recommendation respecting the dismissal of the complaint in No. MC-C-2797 insofar as it pertains to the challenged straight shipments of fresh and green fruits and vegetables, and as such recommendation is amply supported by the evidence and the law, we adopt it as our own. We shall confine our discussion to the matters raised on exceptions.

With respect to the challenged exhibits and the other evidentiary issues, we are of the opinion that the examiner's rulings are proper, for the most part, and within his discretion. The shipments shown on the exhibits were transported by Jones and were supported by shipping documents which were made available to the parties. In our opinion, the objections raised are really directed against the weight to be accorded the exhibits as evidence rather than to their admissibility. The other matters concern mostly opinion testimony and may have been technically admissible, but, in no instance, was their exclusion materially prejudicial to complainant and interveners, and, in our opinion, if all the excluded testimony has been admitted and considered, it would have had no appreciable bearing on the outcome of the instant proceedings. Moreover, many of the facts which the excluded testimony was designed to prove were evidenced by stipulation of the parties or by other witnesses. It is doubtful that any of the new evidence which P.U.C. proposes to present would

have any bearing on the outcome of the proceeding, and in view of the long pendency of these proceedings and our conclusions, the requests of P.U.C. for reopening the records are denied.

Discussion and Conclusions—Several preliminary matters require discussion before the other issues. In No. MC-2797, P.U.C. and intervener, additionally, contend that the examiner erred in finding that defendants, by tacking their operating authorities at Paulsboro or Westville, may lawfully perform the challenged transportation which is subject to economic regulation. They argue, in effect, that the off-route points of Paulsboro and Westville may be served only in connection with service over National's route between Philadelphia and New York whereas the challenged shipments were moved directly from Philadelphia, to the off-route points south thereof without any operation over the Philadelphia-New York route. We agree with the examiner that his described joinder of National's and Victory's considered operating authorities is proper. While we agree that Ferguson Freight Lines, Inc., Modification of Certificates, 62 M.C.C. 621, cited by the parties, imposes the limitation that the off-route points may be served provided that such service is performed "in connection with, and as an integral part of a good faith operation over such regular route", it does not prohibit the tacking of separate authorities involving regular routes and irregular routes where an off-route point is a service point common to both operations; it is sufficient that the off-route point be served from the regular-route point over the most direct highway without the traversal of the appurtenant regular route to any extent. Campbell Sixty-Six Exp., Inc., Extension-Alternate, 83 M.C.C. 650

and National Transp. Co. — Purchase — North Branford Transp., 70 I.C.C. 55. Compare Blewett — Purchase — Hester Truck Lines, Inc., 37 M.C.C. 763. Clearly, this principle governs the authority in question here. As long as National serves Philadelphia it may operate over the most direct highways to Paulsboro or Westville, the common points of service with Victory's irregular-route operation, without the necessity of passing through any point on U. S. Highway 130 north of Philadelphia.

None of the parties seriously questions the lawfulness of the tacking by Jones of its separate authorities in order to perform the transportation challenged in No. MC-C-2732, and having disposed of the issue concerning the lawfulness of the tacking by National and Victory to perform the transportation challenged in No. MC-C-2797, we may now direct our attention to the disposition of the other matters before us.

The facts in these proceedings are substantially similar to those in the Hudson case. There, defendants tacked segments of certain operating authorities to perform transportation by way of routes through New Jersey to some extent between Philadelphia, on the one hand, and, on the other, points in Pennsylvania within 40 miles of Stroudsburg, including Allentown, Scranton, Wilkes-Barre, West Pittston, Shamokin, Catasauqua, Muncy, and others. No stops were made at points in New Jersey to pick up and deliver shipments, the interstate routes utilized were circuitous when compared to the direct Pennsylvania intrastate routes, and no logical reason appeared for the tacking by the defendants there, and the use of the routes thereby formed, other than the fact that defendants there were without intrastate

authority to transport traffic involved. In its report on reconsideration in the Hudson case, the entire Commission affirmed the findings of division 1 that the defendants are engaged in the transportation of intrastate freight between points in Pennsylvania through points in New Jersey as a subterfuge to evade the laws of Pennsylvania, and, in addition it found that such transportation by defendants, inasmuch as it is conducted as a subterfuge to evade the laws of Pennsylvania, is not authorized by defendants' respective certificates. An order was entered in the Hudson case requiring each defendant therein to cease and desist from performing under certificates issued by this Commission all operations found to be intrastate in character.

Upon consideration of all the facts of record, we are convinced that the challenged operations subject to regulations, although ostensibly authorized by their certificates, are, except for their routing, actually in intrastate commerce, and that they are conducted as a subterfuge to evade the laws of Pennsylvania. Jones operates terminals in Philadelphia and Allentown, and its main activity is the movement of less-than-truckload freight. In order to gather the shipments and, by combining them, make up a full truckload, it operates "peddler runs" from its Philadelphia and Allentown terminals which serve as pickups and deliveries of freight in the Philadelphia and Allentown area. All of the freight is directed through the Allentown and Philadelphia terminals and is transported on daily-nightly schedules without stops to pick up and deliver freight between such terminals over the Clinton route which is substantially circuitous when compared with the direct intrastate routes between Phila-

delphia and Allentown. Jones' traffic officer admitted that the Clinton route is utilized because "we know we are authorized." He also stated that Jones advertises to shippers "as to service we perform in our interstate authorities." It also, admittedly, publishes the same rates as intrastate carriers and is competitive with such carriers operating between the considered points.

National and Victory by their use of the Delaware route, particularly Victory, have been participating in the handling of freight from a prolific traffic source in the Philadelphia area to other points in Pennsylvania without any authority from the P.U.C. As noted, Victory obtains 75 percent of the revenue from such tonnage. These defendants jointly hold themselves out to provide interline transportation between Philadelphia and other points in Pennsylvania. The challenged shipments are handled in through carriage without stops except for a tractor interchange, in truckloads, from Philadelphia to the considered points near Harrisburg. Although the Delaware route is only slightly longer than the direct intrastate route over the Pennsylvania Turnpike between the considered points, the driving time over the latter is shown as 42 minutes less than the former. Moreover, National and Victory, before reentering Pennsylvania, must proceed southward and traverse two toll bridges when operating over the Delaware route. Considering all the facts, we are satisfied that the following statement by division 1 in its report in the Hudson case, page 740, applies on all fours to the respective above described operations of the defendants herein:

> No logical reason appears for the present routing of the intrastate freight other than the fact that

defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in the intrastate traffic purportedly under rights arising from certificates issued by this Commission.

We therefore conclude that Jones, and National and Victory, jointly, have, by their engaging in the challenged transportation, attempted in bad faith to convert to interstate traffic, traffic which, but for routing, is actually in interstate commerce subject to the laws of Pennsylvania.

The contentions raised by defendants not discussed herein, were specifically disposed of in the Hudson case, supra, and require no further discussion herein. Defendants' motion in No. MC-C-2732 to dismiss that proceeding on the doctrine of *res adjudicata* is overruled.

In Nos. MC-C-2732 and MC-C-2797, we find that the challenged operations by the respective defendants between the points in Pennsylvania involved, through points in New Jersey in the case of the former, and through points in New Jersey and Delaware, in the case of the latter, in the transportation of property subject to economic regulation both originating and terminating at points in Pennsylvania are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania, and are not authorized by their respective certificates issued by this Commission; and that an order should be entered requiring each defendant to cease and desist, and hereafter abstain from holding themselves out or performing

under certificates issued by this Commission, all operations found herein to be intrastate in character.

In No. MC-C-2797, we further find that to the extent the challenged operations are not subject to economic regulation by this Commission, the complaint should be dismissed.

An appropriate order will be entered.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 5th day of June, A. D. 1962.

No. MC-C-2732

Pennsylvania Public Utility Commission

v.

Jones Motor Co., Inc.

No. MC-C-2797

Pennsylvania Public Utilities Commission

v.

National Freight, Inc., and
Victory Transportation, Inc.

It appearing, That the above-entitled proceedings, being at issue upon complaints and answers on file, and full investigation of the matters involved having been made:

And it further appearing, That the said division, on the date hereof, has made and filed a report herein con-

taining its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That defendants be, and they are hereby, notified and required within 30 days from the date this order becomes effective pursuant to the provisions of section 17(5) of the Interstate Commerce Act, to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character;

It is further ordered, That the complaint in No. MC-C-2797 to the extent that the challenged operations are not subject to economic regulation by this Commission, be, and it is hereby, dismissed.

And it is further ordered, That this order shall become effective on July 23, 1962.

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX "E"

CORRECTED REPORT AND RECOMMENDED ORDER

This report and recommended order supersede the report and recommended order served September 25, 1961.

INTERSTATE COMMERCE COMMISSION

Served September 28, 1961

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

Appendix "E"

No. MC-C-2732
Pennsylvania Public Utility Commission

v.

Jones Motor Co., Inc.

Decided .....

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1. Defendant found to be performing authorized transportation between points in Pennsylvania through points in New Jersey. Complaint dismissed.

2. Motion of defendant to dismiss complaint on ground of res judicata overruled.

William A. Goichman for complainant.

Christian V. Graf, Roland Rice, and *William J. Wilcox* for defendant.

Paul F. Barnes for interveners in support of complainants.

REPORT AND ORDER RECOMMENDED BY ABRAHAM J. ESSRICK, HEARING EXAMINER

By complaint filed November 20, 1959, The Pennsylvania Public Utility Commission, herein called P.U.C., alieges in essence that in May and June 1957 defendant transported property by motor vehicle between certain points in the state of Pennsylvania, over routes in Pennsylvania and New Jersey, as a subterfuge to the jurisdic-

tion of the P.U.C., and in violation of sections 203(c) and 206(a) (1) of the Interstate Commerce Act and sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania. Complainant requests that the Commission issue an order requiring defendant to cease and desist from the alleged violations. Answer thereto and a motion to dismiss the complaint were filed by defendant, and by order dated October 4, 1960, the Commission, Commissioner Murphy, among other things, permitted Highway Express Lines, Inc. and Modern Transfer Company, Inc., herein called Highway and Modern, respectively, to intervene, and overruled defendant's motion to dismiss the complaint.

Hearing was held before the examiner at Philadelphia, Pa. on February 8, 1961, at which all the parties appeared and presented evidence. Briefs were filed and have been considered. Since determination of the question whether provisions of the Public Utility Law of Pennsylvania have been violated is not within the jurisdiction of the Commission, the complaint with respect thereto should be dismissed, and the report herein will be confined to the question whether provisions of the Interstate Commerce Act were violated.

The basic facts were either the subject of a stipulation or were otherwise not disputed. So far as is here pertinent, defendant holds interstate authority to transport general commodities, over regular routes, (1) between Philadelphia, Pa., and New York, N. Y., over U. S. Highway 1, serving all intermediate points, including Trenton, N. J., and off-route points in New Jersey within 35 miles of Princeton, N. J., and (2) between Elizabeth, N. J. and Allentown, Pa., via U. S. Highway 22 and New Jersey

Highway 28, serving all intermediate points, including Clinton, N. J. on U. S. Highway 22, and serving off-route points in Pennsylvania within 25 miles of Allentown. Prior to, during, and since the period mentioned in the complaint, defendant operated between Philadelphia and New York and between Elizabeth and Allentown, over the described routes, using terminals located at Allentown and Philadelphia. For about 3 years, defendant also operated a terminal at Clinton as a breakbulk point in serving shippers in the New Jersey area, but the Clinton terminal was closed in 1954 when defendant decided to use the Allentown terminal as a breakbulk point.

The complaint alleges, and defendant admits, that on May 1, 2, and 24, and June 28, 1957, defendant transported 22 shipments between points in Pennsylvania, as follows: 11 from Philadelphia to Allentown, Bethlehem, Easton and Catasauqua, 4 from Easton to Philadelphia and Hatboro, 3 from Bethlehem to Philadelphia, one from Chester to Bethlehem, one each from Emmaus and Catasauqua to Philadelphia, and one, originating at Oaks, was transported by applicant from Philadelphia to Bethlehem. The routes employed were as follows: from Philadelphia, over U. S. Highway 1 to Trenton, thence over New Jersey Highway 69 to Clinton, thence over U. S. Highway 22 to Allentown, and return movements were over the same routes. Clinton is within 35 miles of Princeton, and defendant operated between Philadelphia and the Allentown area over the described routes by tacking its interstate authorities specified in (1) and (2) above, at Clinton. Of the points mentioned in the complaint, Easton and Bethlehem were served as intermediate points on U. S. Highway 22, Catasauqua and

Emmaus are within 25 miles of Allentown, Chester is within the Philadelphia commercial zone, and Hatboro was served via an unnumbered highway between Hatboro and Philadelphia. None of the transportation specified in the complaint was rendered under any certificate issued to defendant by P.U.C. The distance between Allentown and Philadelphia, from terminal to terminal, over the routes traversed by defendant is 96.2 miles and driving time is 3 hours, whereas the distance over U. S. Highway 309, wholly within Pennsylvania, is 55 miles and driving time is 2 hours, 5 minutes. Using the Pennsylvania Turnpike between these points, wholly within the State, the distance is 74.9 miles and driving time one hour, 50 minutes.

During the period cited in the complaint, defendant conducted daily operations between Allentown and Philadelphia, over the specified route via Clinton. The shipments involved moved over these routes at night, and there were no pickups, changing of freight from one vehicle to another, or any business or terminal stops in New Jersey. With these 22 shipments, on the same trip, defendant transported, between Philadelphia and Allentown on the 4 days cited in the complaint, a total of 108 other shipments moving between points in two States,[1]

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[1] In its brief, the P.U.C. renewed its objection, overruled at the hearing, to the receipt into evidence of four abstracts specifying shipments transported, on the four dates specified in the complaint, on the same trip with those listed in the complaint. It is contended that the underlying documents, samples of which were admitted into evidence, do not establish that these shipments were commingled. Contrary to the contention, the underlying documents themselves, which were available at the hearing, did show that other shipments transported on May 24, 1957 were on the

with distribution or pickups by defendant via peddle runs to and from intermediate points and other points in the area served by it, or defendant connected with an interline carrier where points beyond were involved. Defendant also transported, over the same route, other movements of the same consignors and consignees as are involved in shipments covered by the complaint. The night operation is the only scheduled run between Allentown and Philadelphia, but operations were also conducted during the period, wholly or partially over this route, but not on a scheduled basis, during daytime, pickups and deliveries being made directly from and to points in New Jersey. The involved routes used by defendant and rates pertaining to all the shipments contained in the complaint were published in appropriate tariffs filed with

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same vehicle as the shipments of that date specified in the complaint, and there was uncontroverted testimony that the abstracts of shipments to show commingling on May 1 and 2, 1957 were based on similar underlying documents. While, with respect to shipments on June 28, 1957, the fourth date specified in the complaint, the underlying documents do not themselves establish commingling, these documents, together with oral testimony, sufficiently established movement on that date of other shipments in the same vehicle as those designated in the complaint. The P.U.C. adds that, if the documentary evidence submitted is to be given weight in this proceeding, the examiner erred in denying its request that all, and not only a few, of the underlying documents should be placed into evidence. Under Rule 1.83 of the Commission's General Rules of Practice, the examiner may, in his discretion, refuse to receive into evidence other than a limited number of underlying documents said to be typical. The underlying documents received in evidence are typical and, considering the record as a whole, there are no inaccuracies in the underlying documents, as contended by the P.U.C., to warrant placing additional documents into evidence. The examiner, therefore, sees no reason for reversing the rulings mentioned.

the Commission. No effort was made by defendant at any time to conceal its manner of operation over the involved route. Defendant's solicitors are stationed at Allentown and Philadelphia and at the time covered by the complaint traffic was solicited for freight forwarders, steamship companies, export, for traffic having both origins and destinations in Pennsylvania, and for interline carriers with which it had published through routes and rates.

Defendant had previously applied in 1950 for P.U.C. authority to operate between the Philadelphia and Allentown areas over routes wholly in Pennsylvania, but the application, which was first approved on August 23, 1954, was eventually denied on July 21, 1955. Its certificate to operate between Philadelphia and New York, serving intermediate and off-route points, including Trenton and Clinton, was granted January 23, 1942, and its certificate to operate between Allentown and Elizabeth, serving all intermediate points, is dated March 4, 1953. Temporary authority to operate over the Allentown-Elizabeth segment was granted July 20, 1951.

Both Modern and Highway holds Pennsylvania intrastate authorities to transport property between Philadelphia and the Allentown area, Modern's terminal being located at Philadelphia and Allentown, and Highway's at Philadelphia and Bethlehem. Modern, which is not limited by its operating authority to any specific routes, operates over U. S. Highway 309 between these points because it claims it is the shortest, most practical and economical route for it. The Pennsylvania Turnpike is occasionally used during bad weather or other emergencies. Highway has authority to operate between Philadelphia and the Allentown area via a combination of U. S.

Highway 611, Pennsylvania Highway 412, and U. S. Highway 22, but does not operate over this route, and instead utilizes the alternate route authorized to it over U. S. Highway 309 to Center Valley, Pa., and thence over Pennsylvania Highway 21 to Bethlehem, which it believes is the most logical and economical route. It has also used the Schuylkill Expressway to King of Prussia, Pa., before using U. S. Highway 309, but Highway did not disclose which route it traverses from King of Prussia to connect with U. S. Highway 309. Modern and Highway claim that defendant's alleged unauthorized movements deprive them of transportation they are entitled to transport.

Before discussing the merits of the complaint, certain procedural matters, raised in the briefs, and not previously discussed herein, should first be considered.

At the hearing, and in its brief, defendant moved to dismiss the complaint on the doctrine of res judicata, on the basis of Jones Motor Co., Inc. v. Philadelphia Public Utility Commission, 361 U.S. 11, a per curiam decision which cited Service Storage & Transfer Co. v. Virginia, 359 U.S. 171. Petitions for reconsideration and clarification were denied, 361 U.S. 904. No ruling on the motion was made by the examiner at the hearing since, under Rule 1.70 of the Commission's General Rules of Practice, a hearing officer has no power to decide a motion to dismiss the proceeding. However, this being a recommended report and order, the examiner may make a recommendation herein to the Commission concerning disposition of the motion. The disposition at this point is simple, it being unnecessary to discuss the arguments presented by the various parties with respect to the

motion, for a similar motion, based on the same grounds, has already been overruled by the Commission, Commissioner Murphy; and Division 1, in Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 83 M.C.C. 729,[2] interpreted the Supreme Court's decisions in the Service and Jones cases as of jurisdictional import, that what the Supreme Court held was that determination of the validity of the challenged operations was within the jurisdiction of the Commission rather than that of the P.U.C., and that there had been no decision on the merits by the Supreme Court. Therefore, the doctrine of res judicata does not apply, and it is recommended that the motion to dismiss the complaint be overruled.

On motion by defendant, the testimony of an investigator of the P.U.C., named Staub, was stricken. The P.U.C. claims the testimony, which concerned facts occurring November 22, 1960, was admissible to show a pattern of defendant's activities. This witness did not connect the facts in his testimony to the period covered by the complaint. However, since another investigator testified to similar practices on October 26, 1960 of the same driver, and the other investigator added that the driver had engaged in the same practices during the period of the complaint, witness Staub's testimony is admissible and is hereby made part of the record. Reversal at this time of the examiner's ruling will not prejudice defendant, for Staub's entire testimony was merely cumulative.

Exception is also taken by the P.U.C. to the inclusion of testimony (1) whether the witness, defendant's vice

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[2] Petitions for reconsideration are still pending.

president and director of traffic, had stated in another proceeding that U. S. Highway 309 was the shortest route between Philadelphia and Allentown, and (2) whether the route used by defendant was the normal, regular, or usual route. Although the testimony concerning the relative distance over U. S. Highway 309, as contended, was admissible as an admission against interest, the distance over that route and of other routes between Allentown and Philadelphia was stipulated, and, as will be shown, defendant's prior knowledge that U. S. Highway 309 is the shortest route is not material to the disposition of this proceeding. However, the examiner reaffirms his ruling sustaining an objection to the question whether defendant's route was the normal route used between Allentown and Philadelphia. There was no showing that the witness, a representative of Highway had traveled or was familiar with the route used by defendant, nor was he otherwise qualified, on this record, to answer the question.

It is argued that defendant could not tack its authorities to provide the service rendered between Philadelphia and Allentown, via Clinton. As shown, defendant may operate between Philadelphia and Trenton, the latter being an intermediate point on its regular route between Philadelphia and New York City, and it may serve Clinton as an off route point in connection with that regular route operation. Clinton is also an intermediate point on defendant's regular route authority between Elizabeth and Allentown, with service to points within 35 miles of Allentown as off-route points. Since regular routes of common carriers may be combined through a point which is authorized to be served as an off-route

point from one route and a terminus (which would include an intermediate point) on another (Consolidated Freightways, Inc. v. Lenzmier, Inc., 66 M.C.C. 615), the two regular route authorities were properly tacked by defendants at the common point, Clinton, for rendition of a through service between Philadelphia and the Allentown area. Serving an off-route point does not, as contended, represent irregular route authority so as to result, in this case, in an undesirable tacking of regular and irregular route authorities, for the failure to designate specific routes in serving off-route points in no way changes the basic character of the service, which remains essentially regular route service. Ferguson Frt. Lines, Inc., Modification of Certificate, 62 M.C.C. 621. Service to, from, and through off route points must, of course, be rendered in connection with the appurtenant regular route, and this what defendant has done—it has operated over a portion of its regular route, between Philadelphia and Trenton, and then through Clinton, an off-route point of that regular route.

Pursuant to the provisions of section 203(a) (10) defendant's operations between two points in Pennsylvania, via New Jersey, are physically in interstate commerce, and, as shown, fall within the purview of the operating authorities contained in its certificates, which specifically described the operations authorized therein as transportation in interstate commerce. However, interstate operations under authorized certificates, including tacking, must be bona fide, not for the purpose of subterfuge—and this is the crucial question to be decided in this case.

Appendix "E"

Whether defendant's operations under its certificates were conducted as a subterfuge to evade State regulation is a factual matter, depending upon all the particular circumstances of the given case, and the burden of proof is upon P.U.C. to show that operations over authorized routes are not bona fide. Great stress is placed by the P.U.C. on the fact that the routes used by defendant are circuitous, being almost twice the mileage and requiring 50 percent more driving time, as compared to a more direct route, wholly within Pennsylvania. However, as spelled out in the Hudson case, circuitous routing, between points in a State through another State, in and of itself is not conclusive evidence of a bad faith interstate operation, but other factors must also be considered in conjunction with the circuity. Basically, bad faith is imputed by the P.U.C. and interveners because, they claim, the routes used were not the logical and normal routes that would be taken in conducting the operations in question, pointing out, in addition to the circuity, for which allegedly there was no logical reason other than to create interstate commerce, that the traffic was transported between points in Pennsylvania for shippers and consignees located in that State, where the solicitation and advertising took place, that the operations in Pennsylvania were not supplementary or necessary for defendant's interstate operations, that no stops were made and defendant had no terminal in New Jersey at the time, that selection of the routing was made by defendant and not by shippers, and that, even if the complained of shipments were included in the same vehicle with interstate shipments, the commingling with lawful traffic did not render an unlawful act lawful.

Of course, operations between two points in the same State which would, of necessity, include solicitation therefor, do not per se add up to a conclusion that intrastate operations are involved, for the statute itself places such operations, through another State, in the category of interstate movements, unless it can be shown that the operations were not bona fide. Several cases are cited by the P.U.C. and interveners as precedents in support of their claim and that the facts in this proceeding add up to subterfuge or bad faith, with great reliance being placed upon the Hudson case, Eichholz v. P.S.C. of Mo., 306 U.S. 268; Interstate Busses v. Holyoke Rwy.; 273 U.S. 45; Ryan v. Pennsylvania Public Utility Commission, 17 A. 2d 637 and 44 Fed. Supp. 912; and Inter-City Coach Company v. Atwood, 21 Fed. 2d 83.

In the Hudson case division 1 found subterfuge because there was no logical reason for the circuitous routing via another State other than that the defendants therein were without appropriate intrastate authority, and in fact defendants therein admitted that, in the absence of any regulation of the challenged transportation, more direct routes would have been employed. Assuming that the division's findings in the Hudson case are not reversed after consideration of the pending petitions for reconsideration, the decision in that case does not form a basis for a holding of subterfuge in the instant proceeding.[3] Logical reasons do exist for the circuity in the transportation of the shipments complained of. It is not illogical, but in fact is more practical and feasible from the standpoint of operating efficiency and

[3] If the division's findings are reversed, *a fortiori*, a conclusion of subterfuge in this case would become even less likely.

economy, for a carrier to include in the same vehicles with 108 shipments, which are admittedly in interstate commerce and moving over routes specified in its interstate certificates, 22 other shipments, over a period of four specified days, which, if defendant had held the appropriate authority, might technically have been moved by themselves over a shorter route. The 108 shipments were all transported by defendants at night, as a regularly scheduled operation, between Philadelphia and Allentown, and no stops could be made en route, assembly at or distribution from Philadelphia and Allentown being made by peddle operations during the day. This same patterns of activity was consistently and logically observed with respect to the 22 shipments complained of, all but a few of which had either the same origin or destination as other shipments, included among the 108, transported on the same trip. All shipments of whatever nature, whether moving solely between Allentown and Philadelphia or between other points, wholly in Pennsylvania or having origins and destinations in another State, were, on night runs, such as those on which the challenged operations were transported, handled between Allentown and Philadelphia without stops en route. Assuming that defendant knew that a shorter route was available (and it is inconceivable that it did not), and that it had the proper authority to operate between Philadelphia and Allentown over the shortest possible route, it would not have been likely for defendant to move an average of 5 shipments per day on four different days over this route by themselves, while moving other shipments the same days in the same area in other vehicles via different routes it had to use for these other

shipments. Feasibility appears to have been the purpose of the commingling in this case, and not, as claimed, to make unlawful acts lawful. There is no question that if the carrier had a choice of routing, either waiting to accumulate enough shipments to move over a shorter route or consolidating and moving immediately over a longer route, the latter would be selected as a convenience both to the carrier and to the shipper. In fact, there is no evidence that shippers complained about the longer routing. What might be the logical routes for interveners to use need not necessarily be the most logical routes for defendant. As distinguished from the facts in the Interstate Busses case, the commingling in the instant proceeding was not unnecessary, but, rather, was reasonable. The Inter-City Coach case also does not support the P.U.C. position in this proceeding for in that case, wherein subterfuge was found, a very small number of interstate passengers was commingled in the same vehicle with passengers transported between points in the same State. The reverse is true in this case.

The P.U.C. is concerned that if the challenged operations are permitted a twilight zone would result wherein neither the P.U.C. or the Commission would have jurisdiction. This is not so. In its operations between Allentown and Philadelphia under its certificates, defendant is subject to the regulation and control of the Commission. In that respect, this case differs from the Eichholz case, cited by the P.U.C., for the decision of the Supreme Court in the Eichholz case, as pointed out by that court in the Service case, was premised on the fact that the carrier had no certificate from the Commission, and the authority of the State to take appropriate action

had not been superseded, and not that the interstate operations were a subterfuge.

Operations were conducted via Clinton when applicant had a terminal there, between 1951 and 1954, and the same routing was subsequently continued when the Clinton terminal was closed and Allentown instead became the breakbulk point. The same published routes and rates were applicable to the challenged shipments as well as to unquestioned interstate shipments moving in the same or other vehicles. This proceeding thus differs from the *Ryan* case wherein the carrier based its rates on highway mileage actually travelled when transporting goods from one State (Pennsylvania) to points in another State (West Virginia) but upon a direct highway mileage when transporting between points in Pennsylvania by the roundabout route, via Wheeling, W. Va. Also, in the *Ryan* case, the practice of the carrier of using a direct route in its other authorized operations and a longer route on other occasions cast suspicion on the carrier's motives in making the Pennsylvania shipments via Wheeling. This record shows no operations other than over the longer route. Authority granted by the Commission was properly tacked, no restrictions against operations between Allentown and Philadelphia having been imposed when the certificate of public convenience and necessity giving rise to such authority was granted. Under all the circumstances in this case, as set forth above, there has been no showing that operations under the interstate certificates were not bona fide. See Atlantic Frt. Lines, Inc.—Petition for Declaratory Order, 51 M.C.C. 175. The Complaint should therefore be dismissed.

Appendix "E"

FINDINGS

Upon consideration of all evidence of record, the examiner finds that defendant was lawfully performing authorized transportation as a common carrier by motor vehicle, and that the complaint should be dismissed.

In view of the findings herein, it is recommended that the appended order be entered.

By Abraham J. Essrick, Hearing Examiner.

(Signature) Abraham J. Essrick

Recommended by Abraham J. Essrick, Hearing Examiner.

(Signature) Abraham J. Essrick

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1961.

No. MC-C-2732

Pennsylvania Public Utility Commission

v.

Jones Motor Co., Inc.

This proceeding being at issue upon complaint and answer on file, and upon due notice having been duly

heard by the examiner and submitted by the parties, and full investigation of the matters and things involved having been made, and the examiner having made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint be, and it is hereby dismissed.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(Seal)

Office Supreme Court, U.S.
FILED
MAY 2 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 977

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant

vs.

JONES MOTOR CO., INC.

APPELLANT'S REPLY TO MOTION TO AFFIRM OF JONES MOTOR CO., INC.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 32629.

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TABLE OF CONTENTS

PAGE

Appellant's Reply to Motion To Affirm of Jones Motor Co., Inc.:

I. The present case is not res judicata since the former reversal was solely on jurisdictional grounds 1

II. Appellee makes erroneous references to the evidence in its Motion To Affirm 5

III. The Arrow case controls points which appellee seeks to reargue in its Motion To Affirm 9

Conclusion 10

TABLE OF CITATIONS

CASES:

Arrow Carrier Corporation v. U. S., 375 U.S. 452 4, 5, 9, 10, 11

Costello v. U. S., 365 U.S. 265, 285, 286, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961) 2

Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617 (1903) 9

Jones Motor Co., Inc. v. Pa. P. U. C., 361 U.S. 11 1, 5, 9, 10

Missouri Pacific Railroad Co. v. Roy Stroud, 267 U.S. 404 (1925) 9

Modern Transfer Co. v. P. U. C., 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955) 8

Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia, 359 U.S. 171 ..... 1, 2

TEXT:

Restatement of Judgments:

Section 49 3

Section 65(2) 3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1963
No. 977

Pennsylvania Public Utility Commission,
Appellant

vs.

Jones Motor Co., Inc.

APPELLANT'S REPLY TO MOTION TO AFFIRM OF JONES MOTOR CO., INC.

I. The present case is not res judicata since the former reversal was solely on jurisdictional grounds.

In *Jones Motor Co., Inc. v. Pa. P. U. C.*, 361 U. S. 11, your Honorable Court reversed the judgment of the Superior Court of Pennsylvania on the ground that the State of Pennsylvania has no jurisdiction to determine whether the Jones Motor Co., Inc. was committing a subterfuge of its jurisdiction, since such jurisdiction lies with the Interstate Commerce Commission in the first instance. A previous ruling of similar import had been declared in *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U. S. 171, and that case was cited in the *per*

curiam reversal in the 361 U. S. 11 decision. The fact that the P. U. C. thereafter filed a Petition for Reconsideration and Clarification, which is often done by the losing party, which was denied, can have no legal significance apart from the original decision.

Your Order denying this Petition appears in 361 U. S. 904. The Jones Motor Co., Inc. in its Motion to Affirm unhappily creates some confusion by referring to the Court's denial of this petition as "the second Jones case" (p. 12, Motion to Affirm). Lest the Court be confused by it, appellant wishes to point out that there was no second case as such, only a petition for reconsideration.

Since the reversal was based on the *Service Storage* case which contained the instruction to the Commonwealth of Virginia to file a complaint before the Interstate Commerce Commission if it believed that *Service Storage* was not operating in bona fide interstate commerce, this Commonwealth then filed its complaint before the Interstate Commerce Commission, which has now resulted in this appeal. This is the second case therefore!

A reversal for want of jurisdiction can hardly be considered *res judicata*. The law in this regard was recently reiterated in *Costello v. U. S.*, 365 U. S. 265, 285-286, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), wherein your Honorable Court said:

> "At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In Haldeman v. United States, 91 U. S. 584, 585-586, 23 L. Ed. 433, which concerned a voluntary nonsuit, this Court said, 'there must be at least one decision on a right between the

parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. * * * There must have a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmative.' A similar view applied to many dismissals on the motion of a defendant. In Hughes v. United States, 4 Wall. 232, 237, 18 L. Ed. 303, it was said: 'In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or **the want of jurisdiction,** or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.' (Cases cited)." (Emphasis added.)

In *Restatement of Judgments,* Section 65(2), it is stated:

"2) Where a judgment is rendered in favor of the defendant because the plaintiff seeks a form of remedy which is not available to him, the plaintiff is not precluded from subsequently maintaining an action in which he seeks an available remedy."

In the same *Restatement,* Sec. 49, it is also stated:

"Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what it actually decided."

In the comment to that section an example is given: "Where the judgment is based on the lack of jurisdiction of the Court over the defendant or over the subject of the action . . ."

So far, everyone who has been asked to decide that the first Jones case was a decision on the merits and hence res judicata has ruled the opposite.

The Hearing Examiner in the *Arrow* case, e.g. said:

> "The record indicates that the Supreme Court's ruling in the Jones case was a procedural ruling to enable P. U. C. if it believed that Jones' operation was not bona fide interstate but merely a subterfuge to escape its jurisdiction, to avail itself of the remedy Congress has provided in section 204(c) of the Act."
>
> P. 21a, Motion to Affirm of Pa. P. U. C. in 375 U. S. 452

When the contention was made before Division 1, they said:

> "We are satisfied that no other issue but that of jurisdiction was dealt with by the court in the Service case. Accordingly, we do not regard it as a decision on the merits of the issues under consideration here. It follows, then, that the Jones case, supra, involving an operation comparable to those complained of in the Service case, and reversed, Per Curiam, by the Supreme Court on the strength of the Service case, is similarly of jurisdictional import."
>
> P. 50a, Motion to Affirm of Pa. P. U. C. in 375 U. S. 452. See 83 M. C. C. 729.

The issue was not further discussed in the remaining course of the *Arrow* case up to your Honorable Court: 375 U. S. 452.

When the matter was raised before the Hearing Examiner in this case he said in his Corrected Recommended Report and Order, as follows:

> "Division 1 in Pa. P. U. C. v. Hudson Transp. Co., 83 M. C. C. 729, interpreted the Supreme Court's decisions in the Service and Jones cases as of jurisdictional import, that what the Supreme Court held was that determination of the validity of the challenged operations was within the jurisdiction of the Commission rather than that of the P. U. C., and that there had been no decision on the merits by the Supreme Court. Therefore, the doctrine of res adjudicata does not apply, and it is recommended that the motion to dismiss the complaint be overruled." J. S. P. U. C., p. 96.

Division 1 in the *Jones* case adopted the same approach (J. S. P. U. C., p. 85). The District Court below did not discuss this issue.

We submit that the previous case is not res judicata of the present case now before your Honorable Court.

II. Appellee makes erroneous references to the evidence in its Motion to Affirm.

A. In its statement of facts contained in its Motion to Affirm appellee makes a number of erroneous references to the facts. E.g. in paragraph 8 Jones claims "ex-

press authority to combine'' its routes and refers to Exhibit 5.

No such finding was made by the I. C. C. in this case. It is true that the District Court made such a finding, but, we submit, without justification. Aside from the fact that the District Court is not a fact-finding body, the District Court did not appreciate the true significance of the phrase Jones is urging to authorize its subterfuge. It is interesting to note that Jones never once argued in its briefs before the Interstate Commerce Commission that the I. C. C. in MC-F-4955 had specifically authorized the exact combination of rights as Jones is now using to justify its operations. The clause in question appeared in a transfer proceeding of rights from Clinton Motor Express to the Jones Motor Co., Inc. concerning rights from Philadelphia to New York, and vice versa. The clause which Jones is attempting to use out of context is inserted in practically all transfer orders to eliminate duplicating authority. In other words, if Jones already had a right to go between Philadelphia and Trenton and it acquired a right to go between Phila. and New York City and all intermediate points, of which Trenton would be one, what the I. C. C. is saying by that clause is that these rights are to be unified and duplications eliminated, so that after the transfer Jones does not still maintain two separate sets of rights one from Phila. to Trenton and the other from Phila. to New York City so that it could thereby sell this Phila. to Trenton right or parts thereof. Otherwise, some carriers after acquisitions would continue to have five or 10 or more duplications of segments of rights along various routes, and such carrier could then go into the business of bartering the rights which are duplicated. It was to prevent this that the standard clause which Jones now

cites was inserted into its transfer proceeding. This reference has no materiality to this case and was given no consideration by the I. C. C. The District Court entered perilous ground when it entered upon this area on its own without the expertise of the I. C. C. to guide it.

B. In paragraph 10 of its Motion To Affirm Jones mischaracterizes Exhibits 7, 8, 9 and 10. Jones claims that these exhibits reveal traffic handled by the same consignors and the same consignees as those involved in the shipments in this case. These exhibits merely contain locations of cities and places and no mention is made of any consignor or consignee. Your Honorable Court is urged to consult these exhibits to see for yourselves that the claims made for these exhibits are unsupported by them.

C. Jones in its recital of the evidence sets forth its view of the evidence eliminating and mischaracterizing evidence that the I. C. C. had and could accept by way of direct testimony, or inference, to support the conclusions reached by the I. C. C. in this case. We shall not reiterate all such evidence at this time, but let the various reports of the I. C. C. speak for themselves. Suffice it to say, that many of the facts were stipulated to and agreed upon and this, together with other evidence supporting reasonable inferences, entitled the I. C. C. to draw the conclusion of subterfuge.

D. In paragraph 12 of its Motion To Affirm, Jones speaks of Exhibit 12 in a manner tending to give that exhibit some relevancy to this proceeding. That exhibit did show lawful interstate operations of Jones from Philadelphia to New Jersey, etc. We never assailed such operations and freely admit that Jones does engage in bona fide

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interstate operations when it transports between Pennsylvania and New Jersey or any two other states. Exhibit 12 merely shows transportation between two states. The transportation contained in Exhibit 12 moved during the day and at different times than the transportation involved in the complaint. It has no materiality to the issues in this case.

E. Jones in paragraph 13 contends that there was no concealment. A carrier can commit a subterfuge without adopting all the aspects of secrecy. A carrier can do something for years before a State regulatory body can catch up with it. This do not mean that because it was getting away with it for several years, it is legal. On the other hand, it is interesting to note that Jones had applied for the same rights between Philadelphia and Allentown by direct routes in Pennsylvania and was turned down by the Superior Court of Pennsylvania in *Modern Transfer Co. v. P. U. C.*, 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955), because of the adequacy of existing service. If Jones already had the right I. C. C.-wise, why was it applying for P. U. C. rights for the same thing during the period it claims it was openly operating?

Also on this point of concealment, when Jones was asked about how many pounds it is transporting between Philadelphia and Allentown daily by way of New Jersey routes, and other pertinent questions about its operations at the hearing, its chief and only witness had remarkable lapses of memory. Its good faith can be challenged on more than one basis. Moreover, when the hearing was held in the first case before the P. U. C., Jones never even mentioned any commingling at all and had no such exhibits. The first time such exhibits ever appeared was at the

hearing before the I. C. C. without, incidentally, any prior notice to the P. U. C. or its counsel. A reading of the testimony of the Jones witness regarding these exhibits also reveals a disposition to be something less than frank.

III. The Arrow case controls points which appellee seeks to reargue in its Motion to Affirm.

Appellee instead of discussing the *Arrow* case and its meaning to the present case cites and discusses such cases as *Missouri Pacific Railroad Co. v. Roy Stroud*, 267 U.S. 404 (1925), and *Hanley v. Kansas City Southern Ruy. Co.*, 187 U. S. 617 (1903), which have no relevancy to the issues.

Appellee in its Motion to Affirm is obviously attempting to reargue matters covered by the *Arrow* decision of your Honorable Court. No one denies that Jones is engaging in interstate commerce under the definition of the Interstate Commerce Act and it is for that reason that the I. C. C. had jurisdiction in this case. But what Jones overlooks is the power of the I. C. C. to pass upon the question of subterfuge if such be the case.

The District Court in the *Arrow* case in making mention of the contrary result reached by the District Court in the *Jones* case, stated in passing that the facts are different anyhow, assuming the facts to be those set forth by the Pennsylvania District Court in its Opinion. These facts, however, as we have demonstrated in our Jurisdictional Statement are incorrect and inaccurate and do not represent the view of the evidence that the I.C.C. had a right to take in reaching its conclusions. Moreover, it

is obvious that many of the legal statements set forth in the *Arrow Carrier* opinion differ substantially from the legal position set forth by the District Court of Pennsylvania in its opinion. The *Arrow Carrier* decision therefore was not an appropriate forum to review the correctness of the decision of the District Court in the *Jones* case. In fact neither party argued or brief the *Jones* case to the N. J. District Court hearing the *Arrow Carrier* case since the former decision came out after briefing and argument in the *Arrow Carrier* case had been concluded. Therefore, any references to the *Jones* case in the *Arrow Carrier* opinion or by the U. S. Attorney's Office must be taken to mean that IF the evidence of the *Jones* case compels a finding of no subterfuge, such evidence would nevertheless be different from that in the *Arrow Carrier* case. The legal principles would however be the same. The proper place to review the *Jones* case is now before your Honorable Court and it is our submission that the facts in the *Arrow Carrier* case concerning the Arrow Carrier Corporation and the Hudson Transportation Co. are almost identical to the case at bar and call for a similar decision.

CONCLUSION

No attempt has been made to belabor the contention that the *Jones* case and the *Arrow* case cannot both stand together as authority. The *Jones* case, if allowed to stand, would cut the guts out of the *Arrow* decision and leave the States helpless to cope with motor carrier subterfuge. The type of subterfuge engaged in by Arrow,

by Hudson, and now by Jones, is being engaged in by many others. Proper legal authority is therefore necessary to enable the States to take legal action on behalf of their carriers and the citizenry to stamp such practices out. All over the country the States are waiting with watchful eye for such a decision in this *Jones* case.

We respectfully submit that the decision of the District Court of Pennsylvania was wrong and should be reversed on the basis of *Arrow Carrier Corporation v. U. S.*, 375 U.S. 452.

Respectfully submitted,
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EDWARD MUNCE,
Assistant Counsel,
JOSEPH C. BRUNO,
Chief Counsel,
For Pennsylvania Public Utility Commission.

In the

Supreme Court of the United States

October Term, 1963
No. 977

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant

vs.

JONES MOTOR CO., INC.

PETITION FOR REHEARING OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION UNDER RULE 58

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 32629.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 977

Pennsylvania Public Utility Commission,
Appellant

vs.

Jones Motor Co., Inc.

PETITION FOR REHEARING OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION UNDER RULE 58

To the Honorable the Justices of the Said Court:

The Petition of the Pennsylvania Public Utility Commission for Rehearing under Rule 58 respectfully represents as follows:

(1) On May 18, 1964, at Nos. 900 and 977 October Term, 1963, your Honorable Court, in a Per Curiam memorandum order, granted the Motion To Affirm of the Jones Motor Co., Inc., and affirmed the judgment of the Court below; three Justices of the Court, Mr. Justice Douglas, Mr. Justice Harlan, and Mr. Justice Goldberg, dissented and would have taken jurisdiction.

(2) This decision of the Court presents an apparent conflict with the decision of the Court in *Arrow Carrier*

Corporation v. U. S., 375 U.S. 452, decided January 20, 1964, where the motor carrier was doing the same thing as Jones, but was found guilty of a subterfuge, and this conflict is one of the reasons for this petition.

(3) That the decision of your Honorable Court raises more than a question of fact is pointed up by the history of this case. The Interstate Commerce Commission, which is directly entrusted by Congress with the resolution of factual questions, found and held that Jones Motor Co., Inc. was guilty of a subterfuge. The District Court for the Eastern District of Pennsylvania reversed this finding as a matter of law and your Honorable Court, now, by affirming this decision, is, in effect, holding that carriers such as Jones Motor Co., Inc., are not guilty of subterfuge *as a matter of law*. Certainly, in the minds of a substantial number of lawyers a definite conflict is presented with respect to the meaning of the *Jones* case vis-a-vis the *Arrow-Carrier* case.

(4) That the country as a whole is intimately and vitally affected by your Honorable Court's decision in this *Jones* decision is apparent from the fact that on February 16, 1959, Austin L. Roberts, Jr., and Everette Kreeger, as Attorneys for the National Association of Railroad and Utilities Commissioners, filed with your Honorable Court a Brief as Amicus Curiae in the case of *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171. In that Brief the Resolution of the Association, consisting of all the States in the United States, adopted by the Association on November 20, 1958, is reported. This resolution authorized the Association "to participate in this proceeding on behalf of the Association in support of the jurisdiction of the state regulatory commission over

the transportation involved". In that Brief appears the further pertinent statement on behalf of the Association:

> "If federally certificated carriers can 'tack' together several certificates and by the subterfuge of crossing the state line evade the exercise of police power by an individual state, *then the effectiveness of state regulation is at an end.*"

(5) The aforesaid Association (NARUC) at a meeting held in Portland, Oregon, on August 1 and 2, 1963, by the Executive Committee, adopted a resolution authorizing its Counsel to participate on behalf of the Association in both the *Arrow* and *Jones* cases taking a position in support of the cease and desist orders issued by the I.C.C. This has not come to pass since your Honorable Court has not taken jurisdiction in either case.

(6) There are pending before the I.C.C. and the Federal District Courts other cases involving motor carrier subterfuge, not to mention the thousands of carriers whose daily activities are immediately affected by these decisions as to whether what they are doing is proper or improper.

(7) The Pennsylvania Public Utility Commission as the representative of the Commonwealth of Pennsylvania, one of a number of such states vitally concerned with this problem, is charged with the duty of enforcing the laws of the Commonwealth of Pennsylvania, licensing carriers to perform common carrier service within its borders, and charged with the further duty of protecting such carriers and the general public in this Commonwealth against unauthorized operations by nonlicensed carriers.

(8) The Interstate Commerce Commission upon our complaint held that the Arrow Carrier Corporation and

the Jones Motor Co., Inc., both were engaged in subterfuge operations by engaging in transportation in Pennsylvania from Philadelphia to Allentown through routes and highways in New Jersey.

(9) Recently your Honorable Court upheld the Interstate Commerce Commission in the *Arrow Carrier* case (375 U.S. 452), but has now reversed the Interstate Commerce Commission in this *Jones* case, holding that the I.C.C. erred as a matter of law in finding subterfuge.

(10) Not too long ago Mr. Justice Cardozo with singular adroitness cautioned in *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510, 55 S. Ct. 462 (1934):

> "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi jurisdictional findings of an administrative agency. . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

(11) Although Mr. Justice Cardozo was speaking of the I.C.C., the same caveat applies here to the problem given Pennsylvania in attempting to do our duty to enforce the law so that the motor carrier guilty of a subterfuge can be prevented from pirating business away from legitimate carriers.

(12) Our state is now without "reasonable certitude" in determining whether a carrier is guilty of a subterfuge under the *Arrow Carrier* case or is blameless under the *Jones* case; certainly, when seven judges of the Superior

Court of Pennsylvania, 188 Pa. Superior Court 261, 149 A. 2d 491; the Interstate Commerce Commission; one circuit judge on the three-judge statutory court in the District Court for the Eastern District of Pennsylvania; and three justices of your Honorable Court—when such judicial officials are of the opinion that Jones is or may be guilty of a subterfuge under the law, how can the Commonwealth of Pennsylvania analyze future cases upon a proper basis? Is there not something more called for in the way of further argument and briefing, together with more precise delineation for administrative and judicial guidance? Must all tribunals inferior to your Honorable Court be left "to argue, to choose," to guess as to whether a particular carrier is guilty of subterfuge under the *Arrow* case, or not guilty under the *Jones* case?

(13) Recently, in *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 179, your Honorable Court said:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. . ."

(14) This Commonwealth of Pennsylvania, believing Jones Motor Co., Inc., guilty of such a subterfuge, and our judges unanimously having found same in 188 Pa. Superior Court, 261, 149 A. 2d 491, this Commonwealth filed a complaint with the Interstate Commerce Commission on November 20, 1959, almost five years ago, and that Commission, after extensive testimony and briefing, found Jones Motor Co., Inc. to be guilty of a subterfuge. And now your Honorable Court by affirming the decision of

the District Court without argument, sets aside the decision of the Interstate Commerce Commission as error, and the remedy which your Honorable Court said Congress provided for this Commonwealth is snatched away from us, or rendered as illusory as a Barmecide feast.

(15) Not only is the remedy which Congress has provided for us taken away, but there are no guidelines or principles which we can use to determine how and when we can ever avail ourselves of the "remedy" Congress has provided in the Act.

(16) This question, because of its tremendous importance to the several states and because of the aura of doubt that surrounds this whole field and because of the right of a state to know when and how to proceed and what its rights are, demands further consideration by the Court. It is respectfully submitted that the decision of your Honorable Court should be reconsidered and vacated, and that an order should be entered by your Honorable Court taking jurisdiction of this case so that the parties can adequately and fully brief your Honorable Court on the multiple problems in the field; so that the National Association of Railroad and Utilities Commissioners can offer its assistance to the Court; and so that other parties or states may offer their guidance, to the end that the decision of your Honorable Court will serve as a beacon light guiding the several states in their endeavor to know when and under what circumstances an I.C.C. carrier is committing a subterfuge.

(17) The decision of your Honorable Court in the *Jones* case leaves the states back where they were before the Federal Motor Carrier Act of 1935 was passed. At that, time one of the avowed purposes of the Act was put

on record by the Chairman of the House Subcommittee considering the Bill—Congressman Meritt (79 Cong. Rec. 12207):

> "But the demands of the state regulatory bodies for Federal control of interstate business by busses and trucks is unanimous. It has been found in some cases that bus lines and other forms of transportation will nominally start just over the line of one state, but do the major part of their business in adjoining states *simply for the purpose of using its interstate character to escape the control and the regulation of the state in which the major part of its business is done.* From this point of view alone, a Federal law is not only justified but demanded."

(18) Your Honorable Court has in the past taken cases for plenary argument when such cases are "test" cases or are typical of a great number of pending or existing cases with the view of sufficiently canvassing the legal principles to afford guidance and instruction for the multitude of cases awaiting disposition.

(19) For these reasons your Honorable Court is respectfully urged to take jurisdiction of the *Jones* case and set the matter down for argument.

Wherefore, the Pennsylvania Public Utility Commission respectfully petitions your Honorable Court to reconsider its decision, vacate the per curiam order, and place this case on the list for argument.

And it will ever pray, etc.

Respectfully submitted,
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CERTIFICATE

The undersigned, a member of the Bar of the Court, certifies that this Petition for Rehearing of the Pennsylvania Public Utility Commission under Rule 58 is presented in good faith and not for the purpose of delay.

WILLIAM A. GOICHMAN

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